INDIAN LAW REPORTS,

CALCUTTA SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT CALCUTTA AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM ALL OTHER COURTS IN BRITISH INDIA [EXCEPT THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH] NOT SUBJECT TO ANY HIGH COURT.

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BY THE BENGAL SECRETARIAT FINANCIAL DEPARTMENT,

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WRITERS' BUILDINGS, CALCUTTA.

THE HIGH COURT,

1915.

—:o:—

Chief Justice:

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" SIR JOHN GEORGE WOODROFFE, KT. (*Acting*).
" SIR LANCELOT SANDERSON KT., K.C.

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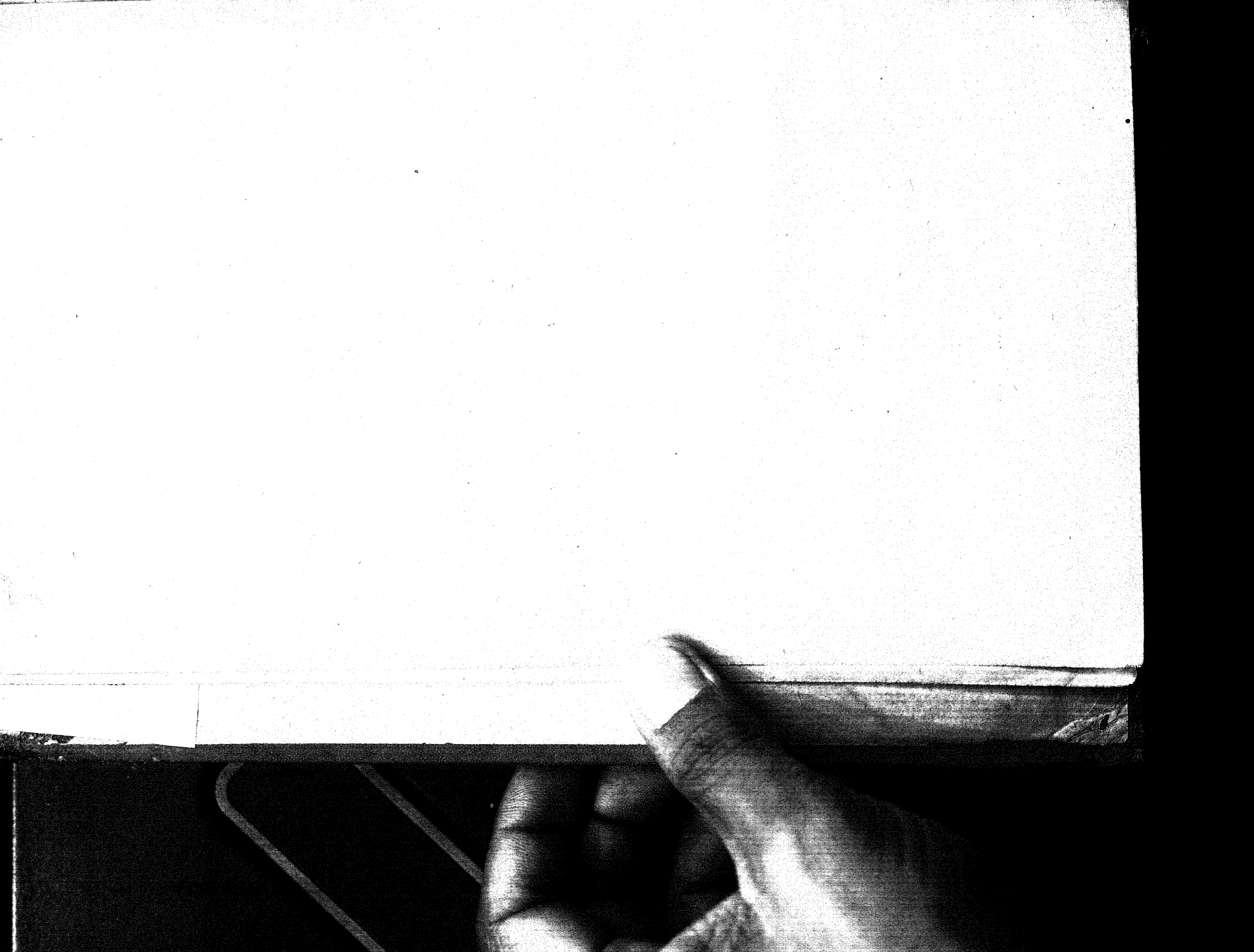

CORRIGENDA.

Page 48, line 22, *for* "busines" *read* "business."
Page 72, line 8 of head note, *for* "finds" *read* "binds."
Page 93, line 7, *for* "*Lord*" read "Loyd."
Page 117, line 23 (head note) *for* "Court" *read* "Courts."
Page 119, line 13, *insert* "K. C." *after* "Finlay."
Page 227, line 1, *for* "Courts" *read* "Court."
Page 227, line 26, *omit* comma *after* "only."
Page 227, line 27, *for* "person" *read* "receiver."
Page 385, line 20 (head note), *for* relation *read* "relation."
Page 386, line 4, *for* "mala holder" *read* "male holder."
Page 390, line 18, *for* "mothers" *read* "mother's."
Page 393, line 15, *for* "word *saptamat*" *read* "words a *saptamat*."
Page 399, lines 21 and 22, for "*bandhus*" read "*bandhu*."
Page 490, line 9, *after* "Waters" *insert* "form part."
Page 505, line 19, *for* "Gaun" *read* "Gann."
Page 507, line 17, *for* "equal" *read* "equal right."
Page 524, line 24, *for* "tidial" *read* "tidal."
Page 528, line 20, for "*pubilci*" read "*publici*."
Page 535, line 19, for "*Walkins*" read *Watkins*.
Page 716, line 21, *after* "1870." *insert* "By doing so the High Court had put a wrong construction"
Page 751, last line (ref.) *for* "C. L. J. 555" *read* "C. L. J. 553."
Page 960, line 23, *for* "adopted" *read* "adapted."
Page 962, line 33, *for* "offence" *read* "offences."
Page 968, line 31, *for* "has" *read* "had."
Page 1027, line 14, *for* "be" *read* "he."
Page 1030, line 15, *for* 1890 *read* 1890."
Page 1036, line 21, *for* the *read* "the.
Page 1036, line 22, *for* Messrs. *read* "Messrs.
Page 1186, line 25, *for* "Jhon" *read* "John."
Page 1187, line 28, *for* "rules" *read* "rules apply."

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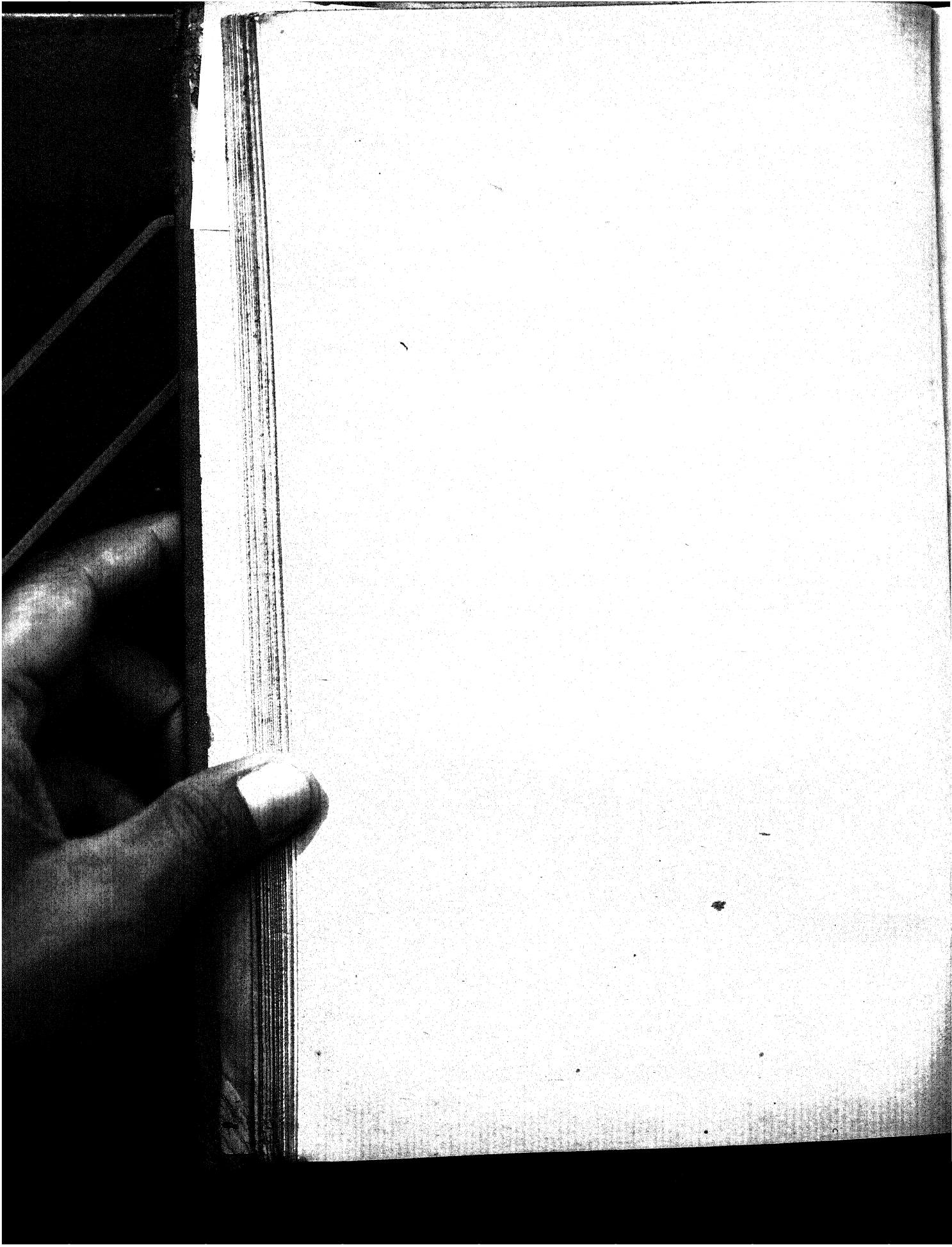

THE

INDIAN LAW REPORTS,

Calcutta Series.

CIVIL RULE.

Before Mookerjee and Beachcroft JJ.

BALMER LAWRIE & Co.

v.

JADUNATH BANERJEE.*

1914

April 6.

Rateable Distribution—Practice and Procedure—Decree—Civil Procedure Code (Act V of 1908) ss. 47, 73—Civil Procedure Code (Act XIV of 1882) s. 295—Appeal.

An order, refusing rateable distribution made under s. 73 of the Code of Civil Procedure (Act V of 1908) between two rival decree-holders, which does not affect or interest the judgment-debtor, is an *order* in execution proceedings but is not a *decree*, as all the conditions enumerated in s. 47 of that Code are not present, and consequently is not appealable.

Jagadish Chandra Shaha v. *Kripanath Shaha* (1) followed.

Sorabji Coovarji v. *Kala Raghunath* (2) distinguished.

It is essential for the application of s. 73 of the Code of Civil Procedure that the decrees should have been *passed* against the *same* judgment-debtor.

RULE obtained by Messrs. Balmer Lawrie & Co., the petitioners.

The petitioners had got a decree against D. Mukherjee & Co. in the Small Cause Court, Calcutta,

* Civil Rule No. 132 of 1914, against the order of Latu Behari Bose, Subordinate Judge of 24-Parganas, dated Jan. 27, 1914.

(1) (1908) I. L. R. 36 Calc. 130. (2) (1911) I. L. R. 36 Bom. 156.

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for a sum of Rs. 1,505 including costs. And in execution thereof in that Court got satisfaction to the extent of Rs. 500 only, rateably along with other creditors, from a sum of Rs. 1,200 sent to the Small Cause Court, Calcutta, by the Chairman of the Calcutta Municipal Corporation alleging that that was the only sum payable by the said Municipality to D. Mukherjee & Co.

Thereafter, it appears, that Jadunath Banerjee, the decree-holder opposite-party, executed his decree against D. Mukherjee & Co. in the 3rd Court of the Subordinate Judge, Alipore, in execution case No. 79 of 1913 and attached two Government promissory notes Nos. 099497 and 131160 of the 3½ per cent. loan of 1842-43 for Rs. 500 and Rs. 200 respectively, and also any money due from the said Corporation to D. Mukherjee & Co. The said Chairman then sent to the Subordinate Judge the aforesaid Government promissory notes and a cheque for Rs. 523-7-8 representing the judgment-debtor's dues from the said Corporation on accounts subsequently taken, all of which were still lying with him unrealised, and also mentioned the fact of there having been previous attachments from the Small Cause Court, Calcutta, of D. Mukherjee & Co.'s dues by a number of creditors, as well as the fact that the said Chairman had sent Rs. 1,200 to the Small Cause Court, Calcutta.

Thereupon the 3rd Court of the Subordinate Judge, Alipore., sent to the petitioner notice of the execution case No. 79 of 1913. And they entered appearance, took time, and finally on the 15th January 1914 after having transferred the decree from the Small Cause Court, Calcutta, to the 3rd Court of the Subordinate Judge, Alipore, filed a petition for execution praying for attachment of the aforesaid Government promissory notes and cheque, and rateable distribution along

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with other creditors after realisation. On the 27th January 1914, the learned Subordinate Judge, after hearing the parties, rejected the petitioner's application holding that they were not entitled to get rateable distribution. Hence they moved the High Court and obtained this Rule.

Babu Biraj Mohan Majumdar, for the opposite party. I have a preliminary objection to take, namely, that as there is an appeal from an order refusing rateable distribution, no Rule should have been granted under s. 115 of the Code of Civil Procedure: vide *Sorabji Coovarji* v. *Kala Raghunath* (1).

[MOOKERJEE J. How do you say there is an appeal?]

As the question is between parties to the suit, the order should fall under s. 47 of the Civil Procedure Code, and hence there is an appeal.

"Assets" in the present section has the ordinary meaning attached to the word and therefore the "assets" of the judgment-debtor in the present case were received by the executing Court on the day on which the promissory notes and the cheque for Rs. 523 were sent by the Secretary, Municipal Corporation, to the Court. This was long before the petitioners applied for rateable distribution, and hence they are out of time.

[BEACHCROFT J. Have the promissory notes been endorsed over to the opposite party, and has the cheque been cashed?]

[*Babu Sajani Kanta Sinha*, for the petitioner. No, the cheque has not been cashed, but the Government promissory notes have been endorsed over to the opposite party Jadunath on the very day on which this rule was issued by your Lordships. There appears to have been an undue haste about it.]

(1) (1911) I. L. R. 36 Bom. 156.

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They are entitled to the money and they have taken it. At any rate the order for rateable distribution was passed in December.

[BEACHCROFT J. How could that be? How could the Court have distributed the Government promissory notes without selling them? Suppose the property was immoveable property instead of Government promissory notes.]

At any rate, the decree was not against the same judgment-debtors. One was against the firm and the other against Dasarathi Mukherjee.

Babu Sajani Kanta Sinha, in support of the Rule. The Rule is in order. No appeal lies from an order under section 73 refusing rateable distribution. It is not an order under section 47, the question not being between the decree-holder and the judgment-debtor but between different decree-holders against the same judgment-debtor. The case of *Sorabji Coovarji* v. *Kala Raghunath*(1) is distinguishable. There the question was whether the sale held of the properties of the judgment-debtor, in spite of the payment of the whole of the decretal amount for which the properties had been attached, was valid or not. This was a question undoubtedly between the judgment-debtor and the executing creditor. The case here is entirely different. Hence the ruling is quite inapplicable.

"Assets" to be held by a Court must be realised before they are assets within the meaning of section 73 of the new Code or section 295 of the old Code. There can be no distribution of the properties of a judgment-debtor amongst creditors before they are "realised;" and "realisation" has been held to mean "converted into cash or such form as to be available for immediate distribution": *Ramanathan Chettiar*

(1) (1908) I. L. R. 36 Bom. 156.

v. *Subramania Sastrial* (1), *Hafiz Mahomed* v. *Damodar Pramanick* (2).

[MOOKERJEE J. But the old section 295 has been considerably changed. In the old Code, the words were, when "assets are *realised*", whereas in the new Code, they are, "assets are *held*." Therefore the real question is about the meaning of "assets."]

No doubt "assets" in the broad sense of the word would mean property of a person that can be made liable for his debts, but this must be taken with the word *held*, *i.e.*, held in such a form as can immediately be distributed to the creditors in satisfaction of a decree for money.

[MOOKERJEE J. Your contention is that it must be converted into cash.]

Yes, or some form which is equivalent to cash.

[MOOKERJEE J. What is that?]

Currency notes or some such thing.

[MOOKERJEE J. Suppose the assets brought into Court are paddy. Is that something available for immediate distribution?]

No, the decree sought to be executed must be one for money and therefore the satisfaction must be in money. This is the import of the decisions in *Ramanatham* v. *Subramania* (1) and *Hafiz* v. *Damodar*.(2)

[MOOKERJEE J. Those are cases under the old Code. Have you got any case decided after the passing of the new Act?]

Yes: *Arimuthu Chetty* v. *Vyapuripandaram* (3). It is a decision of a single Judge of the Madras High Court and shows that Mr. Justice Abdur Rahim thought that "assets" under the new Code must be realised before they can be held by a Court. The

(1) (1902) I. L. R. 26 Mad. 179. (2) (1891) I. L. R. 18 Calc. 242.
(3) (1911) I. L. R. 35 Mad. 588.

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Government promissory notes and the cheque are negotiable instruments and there are special provisions in the Civil Procedure Code for their realisation: *see* Order XXI rules 51 and 76. The Government promissory notes and the cheque were brought into Court, but there was something more to be done under Order XXI, rule 76. The endorsement of the Government promissory notes over to one of the decree-holders is illegal, at any rate irregular. Hence the Court below never realised the property brought into Court under attachment. So it did not hold the assets within the meaning of section 73 before the application for execution and rateable distribution by my client. Therefore, the order complained of is wrong.

As for the decrees not being against the same judgment-debtor, Dasarathi Mukherjee is the sole partner of D. Mukherjee & Co., at any rate is a partner who is personally liable for the debts of the Company, therefore the contention of my learned friend is groundless. The real test is, whether the person, whose money is sought by different creditors under different decrees for money, is liable under each of the decrees: *Gonesh Das Bagria* v. *Shiva Lakshman Bhakat* (1).

[MOOKERJEE J. But the word "passed" is an addition in the new Code.]

No doubt, but it is an addition necessary under the new framing of the section. It does not affect the sense of the old section 295 with regard to the judgment-debtor. A decree against A, B and C, jointly and severally is a decree passed equally against A, B and C. Therefore, a decree against D. Mukherjee and Co. is a decree passed against Dasarathi Mukherjee as well as against any other member of the firm, if any.

(1) (1903) I. L. R. 30 Calc. 583.

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MOOKERJEE AND BEACHCROFT JJ. This Rule is directed against an order by which the Subordinate Judge has refused an application for rateable distribution under section 73 of the Code of Civil Procedure of 1908. The opposite party obtained a decree for money against his judgment-debtor by name Dasarathi Mukherjee, while the petitioner obtained a decree for money against D. Mukherjee & Company, a firm of which Dasarathi Mukherjee was a partner. At the instance of the decree-holder opposite party, the Municipal Corporation of Calcutta, which held two Government securities and a sum of money payable to Dasarathi Mukherjee, placed the properties at the disposal of the lower Court for satisfaction of the decree held by him. During the pendency of a proceeding for rateable distribution as between the opposite party and the other execution creditors of Dasarathi Mukherjee, at whose instance the properties in the custody of the Corporation had been attached through the Calcutta Small Cause Court, the present petitioner, on the 15th January 1914, made an application for rateable distribution. This application has been refused by the Subordinate Judge on the ground that it was made after the receipt of the assets by the Court. The question for consideration is, whether this order has been rightly made.

A preliminary objection has been taken to the Rule on the ground that the order of the Subordinate Judge was in essence made under section 47 of the Code and was appealable as a decree. In support of this view, reference has been made to the case of *Sorabji Coovarji* v. *Kala Raghunath* (1). That case, however, is clearly distinguishable. There the decree-holders had attached the property of their common

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judgment-debtor. Other execution creditors of the judgment-debtor applied for rateable distribution of the assets which might be realised by sale of the property. The judgment-debtor brought into Court a sum sufficient to satisfy the two decree-holders at whose instance the property had been attached. Thereupon the other decree-holder applied for rateable distribution of the sum so deposited, and the Court, without notice to the judgment-debtor, allowed this application. The result was that there was not a sufficient sum left to the credit of the decree-holders, at whose instance the attachment had been effected, to satisfy their dues, and the Court accordingly directed that the property attached be sold in order that their decrees might be satisfied in full. The judgment-debtor appealed against this order, on the ground that no rateable distribution was permissible under the law in respect of the money brought by him into Court, and that as the sum deposited was sufficient to satisfy the decrees held by the two execution creditors who had taken out processes of attachment, their decrees must be deemed in law to have been satisfied, so that there was no execution proceeding left in which an order for rateable distribution might be made. An objection that the appeal was incompetent as the question raised was not within the scope of section 47, was overruled on the ground that the question did arise between parties to the decree. It is not necessary for our present purpose to decide whether, in circumstances like these, the question which arose not merely between the rival decree-holders but also between the judgment-debtor on the one hand and the decree-holders on the other, could be deemed to fall within the scope of section 47. But it is plain that, in the case before us, the question which calls for decision is not within the scope of

that section. This is not a question which arises between the parties to the suit in which the decree under execution was passed; it is on the other hand a question between two rival decree-holders, which does not affect or interest the judgment-debtor. An order made under section 73 is an order in execution proceedings but is not a decree unless all the conditions enumerated in section 47 are present: *Jagadish* v. *Kripa Nath*(1). We must consequently hold that the order of the Subordinate Judge is not appealable and overrule the preliminary objection.

As regards the merits, it is plain that the petitioner is not entitled to succeed. Section 73 provides that where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons. It is essential for the application of the section that the decrees should have been passed against the same judgment-debtor. This has been made clear beyond possibility of dispute by the introduction of the word "passed" which did not find a place in section 295 of the Code of 1882. But, as already stated, the decree held by the opposite party, in execution of which the properties have been brought into Court, was passed against Dasarathi Mukherjee, while the decree held by the petitioner was obtained against the firm of which Dasarathi Mukherjee was a partner, and is not shown to be capable of execution against him individually. Consequently, the two decrees cannot be deemed to have been passed against the same judgment-debtor, and it

(1) (1908) I. L. R. 36 Calc. 130.

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is thus needless to consider whether *Gonesh Das* v. *Shiva Lakshman* (1) has been affected by section 73 of the Code of 1908 which reproduces section 295 of the Code of 1882 in an altered form. In this view, it is also unnecessary to discuss the question, whether the application for rateable distribution by the petitioners was made before the assets had been received by the Court below.

The result is that the Rule is discharged with costs to the decree-holder (and not to the judgment-debtor) opposite party.

G. S. *Rule discharged.*

(1) (1903) I. L. R. 30 Calc. 583.

APPELLATE CIVIL.

Before Woodroffe and Carnduff JJ.

1914

April 8.

ANNAPURNA DASEE

v.

NALINI MOHAN DAS.*

Succession Certificate—Succession Certificate Act (VII of 1889), s. 4.—"Debt," meaning of—Part of debt, if certificate can be granted in respect of—Appeal.

A certificate under the Succession Certificate Act can be granted in respect of a part only of a debt due to the deceased.

The word "debt" is a comprehensive term, which should receive a liberal construction.

Re Ghansham Das (1), and *Mahomed Abdul Hossain* v. *Sarifan* (2), approved and followed.

Akbar Khan v. *Bilkisara Begam* (3), considered.

*Appeal from Order No. 328 of 1913, from the order of M. Smither, District Judge of Dacca, dated June 23, 1913.

(1) (1893) All. W. N. 84. (2) (1911) 16 C. W. N. 231.

(3) (1901) All. W. N. 125.

Bibee Boodhun v. *Jan Khan* (1), *Muhammed Ali Khan* v. *Pattan Bibi* (2), *Bismilla Begam* v. *Tawassul Husain* (3) and *Ghafur Khan* v. *Kalandari Begam* (4) not followed.

APPEAL by Annapurna Dasee from an order of the District Judge of Dacca dismissing the petition of the appellant for a certificate under the Succession Certificate Act empowering her to receive the interest on certain Government promissory notes and the dividends on certain Bank of Bengal shares.

The appellant was the widow and heiress of one Sanatan Das, who died on February 24th, 1902. Part of the estate of the deceased consisted of certain Government promissory notes and Bank of Bengal shares, and upon these there was due, by way of interest and dividends at the date of the death of the deceased, a sum of Rs. 4,963-10-4. On April 25th, 1913, the appellant presented a petition for a succession certificate in respect of this sum without asking either for payment of interest and dividends accruing between the date of the deceased's death and the date of the petition or that the promissory notes and shares should be made over to her. The District Judge dismissed the petition. Hence this appeal.

Mr. S. P. Sinha, *Dr. Rash Behary Ghose*, and *Babu Upendra Lal Roy*, for the appellant.

Mr. B. Chakravarti, *Mr. B. C. Mitter*, *Babu Bepin Chandra Mullick* and *Babu Suresh Chandra Das*, for the respondents.

Cur. adv. ault.

WOODROFFE J. This appeal arises in connection with an application which has been made for a succession certificate.

(1) (1870) 13 W. R. 265.
(2) (1896) I. L. R. 19 All. 129.
(3) (1910) I. L. R. 32 All. 335.
(4) (1910) I. L. R. 33 All. 327.

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The deceased Sanatan Das died leaving Government promissory notes and Bank of Bengal shares on which Rs. 4,000 odd were due for interest at the time of his death, and since his death over Rs. 75,000 as further interest have fallen due. The application is by his widow for a certificate which will enable her to realise interest and dividends due up to the date of her husband's death but not the interest and dividends falling due after his death, or the principal. The object of the application apparently is that the applicant may thereby be exempted from finding a large security which she would have to find if a certificate were applied for in order to recover the principal, interest and dividends accruing both before and after the death of her husband.

The learned Judge was of opinion that the certificate, as asked for could not be granted. He says: "The law intends that in fit cases security should be taken to protect such claims. The present peculiar limitation is intended to evade the giving of any such security. I am not prepared to make the limited grant prayed for. In the absence of any valid objection by the objector, whom I have not yet heard, I am prepared to make a grant in the ordinary way of power to realise dividends and interest, not limited to a particular date, but generally such as fall due on proper security being given. I find nothing to indicate that it was intended that power should be given to realise dividends for a very short period only, the provisions are for granting power to realise dividends: and practically apart from the question of law there is no good reason for so limiting a grant. I decline to make the limited grant prayed for in all the circumstances. Subject to what I may hear from the other side, I will make a grant in the ordinary way on proper security being given, and not one to enable the applicant to

draw Rs. 4,000 odd with security and Rs. 75,000 odd at present and more in the future without security."

A preliminary objection has been taken by the respondent that no appeal lies on the ground that the order which I have just read was not a final order from which an appeal would lie. In my opinion, however, there is no force in this contention. There was a final order namely, that portion of the order in which the Judge says that he declines to make the grant prayed for. It is true that he went further and said that he would be prepared to make another grant different from that which he had refused, but that was an expression of opinion as to what he was prepared to do under different circumstances and did not affect the finality of the order which was passed. He refused to grant the application prayed for merely adding as a rider, which in effect was unnecessary that if another application was made in a different form he would consider it. In my opinion, therefore, the preliminary objection fails and an appeal lies. The question we have to consider is as to the merits of this application. There is a ground which has been taken in appeal that the learned District Judge should have held that Act VII of 1889 had no application to the interest and dividends falling due after the death of the appellant's husband, it being contended in such grounds that such interest and dividends were a debt not due to the deceased but due to his widow, the present applicant, and that therefore the petitioner was not bound to include the interest and dividends in the present application. On the other hand, it has been contended that the principal sum was a debt due to the deceased even though it may have been payable after his death and that the rule governing the grant of a certificate to recover such principal applies not only in respect of the interest earned by

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such principal before the death of the deceased but also after his death. It is, however, unnecessary in the present case to consider this point because I think that the appeal may be dealt with upon the other grounds to which I am now about to refer.

The question which we have to decide is whether a certificate can be granted for the recovery of a part of a debt. It appears to be well established that a separate certificate may be granted in respect of separate debts and that there is nothing in law which compels the applicant for such a certificate to apply for a certificate in respect of all the debts due to the deceased. But the question which is now before us is this, whether assuming that to be so we can go further and hold that as regards a single debt, a certificate can or cannot be granted for the purpose of enabling the applicant to recover a portion of that debt. The word "debt" is a comprehensive term which I think should receive a liberal construction. The object of the Act is to protect the debtors of a deceased person but there is nothing in law which prevents a debtor from making payment of his debt without the production of a certificate if he so chooses. Now, the first point from which the matter may be looked at is that of authority, it being contended by both sides in this appeal that the Case law supports the respective contentions which they have placed before us and there are decisions which may be cited in support of either of these contentions.

The earliest decision to which we have been referred is *Mussamat Bibee Boodhun* v. *Jan Khan* (1). In that case Mussamat appealed against an order granting Jan Ali a certificate to collect five-sixths of the debts due to the estate of Zuhur Ali and the learned Judges say "Now, we observe at the outset of the

(1) (1870) 13 W. R. 265.

case that this order is irregular. Act XXVII of 1860—that is the old Succession Certificate Act—does not contemplate a division of a certificate or a power to collect fractional shares of debts." This passage favours the respondent's contention and indeed goes the whole way which he desires us to go; but the statement there made was a mere expression of opinion. It does not appear to have been the subject of discussion or argument and was unnecessary seeing that the suit in which it was given was not heard but was compromised.

In the case of *Muhammad Ali Khan* v. *Puttan Bibi* (1), it was held by Sir John Edge C. J. and Burkitt, J. that a certificate for collection of debts under Act VII of 1889 may be given for the collection of any one or more separate debts of the deceased, but not for the collection of part only of a debt. The ground upon which the learned Judges appear to have based their decision was that a contrary view might lead to a multiplicity of suits and the harassment of debtors.

This case was followed by that of *Bismilla Begam* v. *Tawassul Husain* (2) in which it was held that no certificate could be granted to one of the heirs of a Mahomedan lady who had died leaving a dower debt unrealised for collection merely of a part of the dower debt of the deceased. It was also followed by the decision in *Ghafur Khan* v. *Kalandari Begam* (3), in which it was held that no certificate could be granted to one of the heirs of a Mahomedan lady, who had died leaving her dower debt unrealised, for collection merely of a part of the dower debt of the deceased. There again, the decision was based on the ground that a debtor is not to be harassed more than once for one debt and a multiplicity of

(1) (1896) I. L. R. 19 All. 129. (2) (1910) I. L. R. 32 All. 335.
(3) (1910) I. L. R. 33 All. 327.

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suits in respect of one cause of action should be discouraged and on the ground that the word "debt" must be taken to mean the whole of the debt due to the deceased and not a portion or share of such debt. It was considered that the latter view was opposed to the scheme of the Act which had been enacted to afford protection to debtors and had nothing to do with the convenience of the applicant or his right to, or share in the debt.

Previous, however, to this, there appears to have been a conflict even in the Allahabad High Court on this point; for, in the case of *Akbar Khan* v. *Bilkisara Begam* (1), Chamier J. doubted the correctness of the decision in *Muhammad Ali Khan* v. *Puttan Bibi* (2), and was of opinion, that the word "debts" in section 6 (*f*) of the Succession Certificate Act means debts due, *i.e.*, alleged to be due from debtors to the person applying for the certificate.

Further, *In re Ghansham Das* (3), Blair J. gave a decision which directly supports the contention of the appellant before us holding that there was nothing in the Succession Certificate Act of 1889 to preclude a Judge from granting a certificate for partial collection of the debts of a deceased person, security being furnished by the applicant of proportionate amount. He, therefore, says "there seems to be no practical objection to the issue of a certificate for partial collection inasmuch as the Act itself contemplates the addition to a certificate of debts to which it did not originally apply."

Further, the latest case, and it is one in our Court, supports the view which we have been asked to accept by the appellant. That case is *Mahomed Abdul Hossain* v. *Sarifan* (4), and was decided by

(1) (1901) All. W. N. 125.
(2) (1896) I. L. R. 19 All. 129.
(3) (1893) All. W. N. 84.
(4) (1911) 16 C. W. N. 231.

Mookerjee and Carnduff, JJ. There the Court dissented from the decision in *Ghafur Khan* v. *Kalandari Begam* (1) and held that section 4 of the Succession Certificate Act does not require that the certificate should cover the whole of the debt, if the heirs do not seek to realise the whole. This was a case in which one of several heirs of a deceased Mahomedan lady sued her husband for a portion of the share of the deferred dower due by the defendant to the deceased relinquishing the balance. It was held that in respect of the deferred dower, each of the heirs of the deceased had a distinct right enforceable by himself, though all might jointly sue and that it was open to each to relinquish a portion of the claim. It was also held that an application by the plaintiff for a succession certificate in respect of the amount claimed by her in the suit was properly granted. No doubt, the circumstances of that case were not exactly the same as those before us; but the principle upon which the decision proceeds seems applicable to the present circumstances; for the debt due to the deceased was one debt and yet it was held that a partial certificate might be granted to one of several of the heirs to recover the portion of that debt which he claimed. And if this may be done, I do not see in principle why a person may not, as in this case, apply for a certificate to enable him to recover a portion of a debt due to the deceased. The matter appears to be one which rather affects the question of revenue than anything else. But there does not appear to me to be, as Blair J. points out, any practical objection to the grant of such a certificate which may be, as in the present case, a distinct convenience to the applicant.

As regards the objection which has been taken that such a procedure may lead to a multiplicity of

(1) (1910) I. L. R. 33 All. 327.

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WOODROFFE J

suits, the answer appears to me to be two-fold. In the first place, if the debt be due and the debtor be honest and solvent, he will pay on the production of the certificate, for the grantee of the certificate can give him a valid discharge to the extent indicated by the instrument. There will then be no necessity for a suit, and the question of multiplicity upon which the learned Judges of the Allahabad High Court proceed, will not arise at all. Nextly, if there is such a suit it by no means follows that, because a certificate may be given to recover a fractional share of a debt, the principle of law which prohibits multiplicity of suits, is in any way affected. We must distinguish between two separate things, one is the grant of a certificate and the other is the institution of the suit. We are not here concerned with the frame of a suit but whether a certificate should be granted, and it may well be that though a certificate may be granted to recover a fractional share of a debt, yet if the person to whom the certificate was granted were to sue for a portion of a debt which he might have sued for in a previous suit, his claim would be barred under the provisions of the Civil Procedure Code.

I am of opinion, therefore, that both on the ground of principle and of the authorities to which I have referred and which support the contention of the appellant, this appeal should succeed, I therefore would reverse the order of the District Judge rejecting the application for a certificate in the terms prayed for by the appellant, and remand the case to him for a re-hearing.

The respondents will pay the appellant's costs of this appeal.

CARNDUFF J. I agree.

Appeal allowed; case remanded.

H. R. P.

CRIMINAL REFERENCE.

1914

April 21.

Before Sharfuddin and Coxe JJ.

ABHAYESWARI DEBI

v.

KISHORI MOHAN BANERJEE.*

Complaint—Personal presentation of complaint—Complaint of defamation presented by alleged agent of pardanashin but not signed by her—Power of attorney not filed in Court—Necessity of examination of complainant before issue of process Examination of pardanashin on commission—Criminal Procedure Code (Act V of 1898), ss. 198, 200, 503—"At once."

The words "at once" in s. 200 of the Criminal Procedure Code clearly indicate that a complaint must ordinarily be presented in person : otherwise a Magistrate should be very loath to take cognisance, and should not accept a complaint, not signed by the alleged complainant, and not preferred by a person duly authorized to institute the specific complaint.

No process can be issued against the accused, either by the Magistrate first taking cognisance, or by the Magistrate to whom the case is transferred, unless and until the Magistrate issuing it has first examined the complainant, and this course is the more necessary in the case of a *pardanashin* to enable the Magistrate to satisfy himself that the complaint is really her action.

When a *pardanashin* makes a complaint, the Magistrate may take cognisance, if satisfied that it is really her complaint, by whatever means it reaches him.

When it is presented on her behalf, the Magistrate may, under s. 503 of the Code, issue a commission for the examination required by s. 200. Section 503 is very wide in its terms, and refers not only to an inquiry or trial but to any other proceeding, and authorises the examination of any "witness", which includes a complainant.

* Criminal Reference, No. 1 of 1914, by R. D. Chatterjee, 4th Presidency Magistrate, Calcutta, dated March 25, 1914.

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Where a written complaint of defamation was presented by an alleged agent on behalf of a *pardanashin*, but it was not signed by her, nor was any power of attorney filed before the Magistrate, and he issued process without examining the complainant :

Held, that he had no power to issue process in such a case.

THERE appeared in a weekly newspaper called the "*Indian Empire*," printed and published in the town of Calcutta, a series of articles reflecting on the management of the Bijni Raj under the present *Rani*, Abhayeswari Debi, who resided in the Goalpara district in Assam. On the 6th November 1913, one Bhuban Mohan Chatterjee, Assistant Superintendent of the Bijni estate, presented a complaint before the Chief Presidency Magistrate, purporting to be made on behalf of the *Rani*, and as her constituted agent, against Kishori Mohan Banerjee and others, the editor and the printer of the said newspaper, charging them with defamation, under s. 500 of the Penal Code. The petition of complaint was signed by Bhuban but not the *Rani*, and no power of attorney was filed in Court. The Magistrate issued process, without examining the lady, and transferred the case thereafter to the Second Presidency Magistrate who examined several prosecution witnesses, but refused to issue a commission for her examination. On application by her to the High Court, the case was transferred to the Chief Presidency Magistrate who sent it to Babu R. D. Chatterjee for disposal.

On the 24th March 1914, when the case was called on for hearing, the counsel for the accused objected to the trial proceeding on the ground that, under s. 198 of the Criminal Procedure Code, a complaint by the *Rani* was necessary, and that there was nothing to show that the petition presented by Bhuban was her complaint, there being no power of attorney on the record. The Magistrate thereupon referred the

case, under s. 432 of the Code, to the High Court, through the Registrar, in the following terms :—

"Under section 432, Criminal Procedure Code, I beg to refer the following point of law to you for submission to the Hon'ble Judges of the High Court for decision. A case of defamation (section 500, I. P. C.) was instituted in the Court of the Chief Presidency Magistrate of Calcutta on the 6th November 1913, on behalf of Rani Abhayeswari Debi, Rani of Bijni, through her constituted attorney Bhuban Mohan Chatterjee, Assistant Superintendent, Bijni Raj, against Kishori Mohan Banerjee and others. The petition was signed by Bhuban Mohan Chatterjee on behalf of Rani Abhayeswari Debi of Bijni and not signed by the Rani. No power of attorney has yet been filed in this matter . . . . . On the case being called up to-day (24th March 1914), the defence counsel wanted *de novo* trial, and contended that, as the Rani, who is alleged to have been defamed, did not lodge the complaint herself but did so through one Bhuban Mohan Chatterjee who was represented in the petition as her constituted agent, the complaint could not be said to have been made by the party aggrieved, and as such, under section 198, Cr. P. C., the case cannot go on. As this point is not free from difficulty, I submit the record of the case to you for laying before the Hon'ble Judges of the High Court for their decision on the following point:—"Whether the Rani can institute the case of defamation through her agent, Bhuban Mohan Chatterjee, and whether by doing so the requirements of section 198, Cr. P. C., have been met with.

The whole record of the case including the petition of complaint is submitted for their Lordships' decision."

Mr. H. N. Sen (with him *Babu Tarkesswar Pal Chowdhury*), for the accused. The Chief Presidency Magistrate has no jurisdiction, by reason of s. 198 of the Code, to take cognisance, except on the complaint of the person aggrieved viz., the *Rani* : *see* s. 345. The petition of complaint was not signed by her, nor was any power of attorney filed by Bhuban. Refers to *Chhotalal Lallubhai* v. *Nathabhai Bechar* (1), *Thakur Das Sar* v. *Adhar Chandra Missri* (2), *Satya Charan Ghose* v. *Chairman of the Utterpara Municipality* (3), *Kesri* v. *Muhammed Bakhsh* (4) and

(1) (1900) I. L. R. 25 Bom. 151.
(2) (1904) I. L. R. 32 Calc. 425.
(3) (1897) 3 C. W. N. 17.
(4) (1896) I. L. R. 18 All. 221.

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Rangasawmi Gounden v. *Sabapathy Gounden* (1). There is no evidence of Bhuban's authority to file the present complaint: *Kali Kinkar Sett* v. *Nrityn Gopal Roy* (2). The power of attorney must show not general authority to prosecute, but authority to file the particular complaint: Mackenzie on Powers of Attorney, p. 33. There is nothing to show that that complaint was really the act of the lady and not that of others acting under the colour of her name.

Mr. J. N. Roy (with him *Babu Manmatha Nath Mukerjee*), for the complainant. As the Magistrate has already issued process and transfered the case, the accused cannot now complain of the want of jurisdiction. The person presenting the complaint has a general power of attorney to institute criminal prosecutions. The lady ought to be examined on commission.

COXE J. This proceeding arises out of a complaint, purporting to be made on the part of Rani Abhayeswari Debi against the petitioners, accusing them of committing defamation. The complaint is not signed by the *Rani*, but by one Bhuban Mohan Chatterjee on behalf of the *Rani*. We are informed that there is no power of attorney on the record, and that there is no power of attorney authorizing the presentation of this specific complaint, although there is a general power of attorney authorizing the presentation of criminal complaints. The document was presented to the Chief Presidency Magistrate, who issued process against the accused; and thereafter the case was transferred. The Magistrate, to whom it has ultimately come, has referred for our decision the following point—"Whether the *Rani* can institute the case of defamation through her agent, Bhuban Mohan Chatterjee, and whether by

(1) (1868) 4 Mad. H. C. R. 162. (2) (1904) I. L. R. 32 Calc. 469.

doing so the requirements of section 198 of the Criminal Procedure Code have been met with."

If the *Rani* makes a complaint to a Magistrate the Magistrate is entitled to take cognizance of it. But before he takes cognizance he must be satisfied that it is her complaint. It is comparatively unimportant by what means the complaint reaches the Magistrate, if really it is her own complaint.

But I hold that the Magistrate should be very loath to take cognisance of any complaint which is not presented in person. The words "at once" in section 200 of the Code clearly indicate that ordinarily a complaint must be presented in person. And I do not think that a complaint should ever be accepted which is not signed by the complainant and is not preferred by a person duly authorized to prefer that specific complaint.

It is perfectly clear to me that the Magistrate in the Court below had no right to issue process against the accused persons in this case. It has been argued that, when a case is transferred under section 192 of the Criminal Procedure Code before the complainant has been examined, process can issue without the examination of the complainant. That argument really has no application to the present case, because, as a matter of fact, process had been issued before the case was transferred. But in any case it is perfectly well settled that a process cannot be issued against an accused person, either by the Magistrate first taking cognizance of an offence, or by the Magistrate to whom the case is transferred under the proviso to section 200 of the Criminal Procedure Code, unless and until the Magistrate issuing process has first examined the complainant; and this is perhaps more necessary in the case of a *pardanashin* lady than in other cases to enable the Magistrate to satisfy himself that the

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complaint is really her own action. In the present case if the complaint is ill-founded, it would be difficult, if not impossible, to fix the *Rani* with any responsibility for the proceeding.

I see no reason, however, why the complainant should not be examined under section 503 of the Criminal Procedure Code. The terms of that section are very wide. They refer not only to an enquiry and a trial but to any other proceeding. The section authorizes the examination of any witness, and a complainant is certainly, in my opinion, a witness. There is, indeed, less objection to the first examination of a complainant than to the examination of a witness under this section, inasmuch as, on the examination of a complainant before process is issued, the accused is not entitled to be present or to cross-examine.

It seems to me, therefore, that the proper course to adopt in this case is to say that, if the complaint on the record is the complaint of the *Rani*, a point on which we have no materials for a decision, the requirements of section 198 have been satisfied. But the Magistrate was wrong in issuing process against the accused persons. In these circumstances it is best to quash the whole proceedings, giving liberty to the *Rani* to make such further complaint as she may be advised. If such complaint is made, the examination of the complainant under Chapter XVI of the Code may be made by a commission, which should be directed to a Magistrate.

SHARFUDDIN J. I agree.

E. H. M.

CRIMINAL REVISION.

Before Holmwood and Sharfuddin JJ.

ASHRAF ALI

v.

EMPEROR.*

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April 23.

Bail—Grounds of admission to bail—Confession of a co-prisoner materially corroborated as to applicant—Relative powers of the High Court and Subordinate Courts to grant bail Criminal Procedure Code (Act V of 1898) ss. 497 and 498.

Section 497 of the Criminal Procedure Code contains a rule founded on justice and equity, and should be followed by the High Court, unless any thing appears to the contrary. The extended powers given to the latter by s. 498 are not to be used to get rid of the reasonable and proper provision of the law laid down in s. 497.

The High Court refused bail where a confession by a co-accused implicating himself and the petitioners was materially corroborated as to the latter by other evidence taken at the preliminary enquiry into offences under ss. 307 and 337 of the Penal Code.

ON the night of the 25th January 1914, the house of F. W. Higgins, a tea-planter, who lived with his son in the interior, about 19 miles from the town of Chittagong, was raided by 13 men with the object of plundering a safe containing Rs. 2,000. One of them, named Niyamat Ali, was seized on the spot and made a confession implicating himself and the present petitioners, Ashraf Ali and others. Warrants were issued against them and they surrendered in the early part of February. The charge-sheet in the case was submitted on the 6th March, and the preliminary enquiry commenced on the same day. The

* Criminal Miscellaneous No. 60 of 1914, against the order of the Sessions Judge of Chittagong, dated March 21, 1914.

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whole of the evidence had been recorded except that of Higgins, who was under treatment in the Presidency General Hospital for the injuries he received from the assailants, but who was expected to be present in the Magistrate's Court within a fortnight. The confession was corroborated materially by the evidence on the record as to the present applicants, who were charged under ss. 307 and 337 of the Penal Code. The enquiring Magistrate refused bail, and his order was upheld by the Sessions Judge of Chittagong. The petitioners thereupon moved the High Court and obtained the present Rule.

Mr. E. P. Ghose and *Babu Chandra Sekhar Sen*, for the petitioners.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown.

HOLMWOOD AND SHARFUDDIN JJ. This was a Rule calling upon the District Magistrate of Chittagong to show cause why the petitioners should not be admitted to bail. It is opposed by the Crown represented by the learned Deputy Legal Remembrancer, and the District Magistrate has submitted an explanation in which he points out that one of the accused who was captured at the time has made a long confession implicating himself and the other persons who are now praying for bail before this Court, that the confession has been corroborated to a certain extent by evidence which has been recorded by the Magistrate, who was enquiring into the case, and in a few days' time Mr. Higgins, the complainant, who was assaulted, will be in a position to give his evidence and we do not know what light it may throw on the matter. But what we have to consider in this case is whether the corroboration is in the nature

of material corroboration at law, and from the account which has been placed before us by the learned counsel appearing in support of the Rule, we must say that, so far as it goes, it is what the law considers material corroboration. Of course we do not, and we should not think of throwing out any opinion as to whether this evidence is to be believed. We do not desire to prejudice the case in any way. We merely state that the evidence which is put before us through the learned counsel is, if believed, evidence which in law amounts to material corroboration, and we think that the rule laid down in section 497 for the guidance of Courts other than the High Court is a rule founded upon justice and equity and one which should be followed by us as well as by every other Court unless any thing appears to the contrary. The extended powers given to the High Court under section 498 are certainly not to be used to get rid of this very reasonable and proper provision of the law.

For these reasons we think that at the present stage of the case bail should not be given. It will, of course, be within the competence of the lower Courts to admit the petitioners to bail at any time after Mr. Higgins is examined, or whenever it should appear that the *primâ facie* case against them has in any way been weakened.

The Rule is discharged.

E. H. M. *Bail refused.*

APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

1914

April 30.

JOGENDRA NATH GOSWAMI

v.

CHANDRA KUMAR MOZUMDAR.*

Chukani Right—Contract of sale of a chukani tenure—Misrepresentation by non-disclosure of facts—Suit for reseission by purchaser—Transfer of Property Act (IV of 1882), s. 55—Duty of seller.

A *chukani* tenure in the District of Rungpur is not a temporary tenure under the Transfer of Property Act terminable at six months' notice but a *raiyati* leasehold which may develop into occupancy right.

When the vendor is informed by the purchaser of his object in buying certain property and the lease contains covenants which will defeat that object, mere silence will, in equity, be equivalent to misrepresentation.

Flight v. *Barton* followed (1).

SECOND appeal by Jogendra Nath Goswami, the plaintiff.

This appeal arose out of a suit for recovery of the halves of currency notes of the value of Rs, 1,400 given by the plaintiff to the defendant for a plot of land which the plaintiff contracted with the defendant to buy for Rs. 1,400.

Plaintiff informed the defendant that he was buying the land to settle his grand-nephew permanently thereon and enquired if it would answer the purpose. Plaintiff subsequently found that the defendant did not possess a transferable *chukani* right in the land.

* Appeal from Appellate Decree, No. 2827 of 1911, against the decree of Prankrishna Biswas, District Judge of Rungpur, dated July 26, 1911, affirming the decree of Ali Ahmed, Subordinate Judge of Rungpur, dated Sept. 30, 1910.

(1) (1832) 3 My. & K. 282.

Hence the suit for refund of the half notes The learned Subordinate Judge held that the defendant had a transferable right to the land and he accordingly directed the defendant to execute a *kabala* on receipt of the other halves of the notes. Plaintiff, therepon, appealed to the District Judge of Rungpur and contended that the defendant had given him to understand that he had a permanent right to the land which he had not, and the plaintiff was therefore entitled to rescind the contract. He also contended that the defendant had no transferable rights.

The learned District Judge held that there was no misrepresentation and dismissed the appeal. Hence the second appeal.

Babu Mahendra Nath Roy (with him *Babu Hira Lal Sanyal*), for the appellant. The suit has been dismissed on one of the issues but the material questions have been overlooked. It has been found that the seller has a transferable interest but has he such interest as he professed to transfer (Transfer of Property Act, s. 55(*2*). If he had no such interest, plaintiff should succeed.

It is also necessary to determine what was it exactly that the plaintiff understood he was buying and whether the defendant, by his conduct, induced him to believe that he held a permanent interest. Defendant knew plaintiff's object in buying the land. His silence amounted to misrepresentation : Darts' Vendors and Purchasers, 7th. Ed., 103-04; *Flight* v. *Barton* (1). If the defendant is innocent of wilful misrepresentation, even then, if the plaintiff was under a wrong impression and the defendant was aware of it, the contract could not stand.

(1) (1832) 3 My. & K. 282.

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Babu Kishori Lall Sircar (with him *Babu Harish Chandra Roy*), for the respondent. Plaintiff knew the nature of my right. He was a sub-tenant on the land for years. He entered into the contract with his eyes open.

Rescission can only be allowed under circumstances specified in s. 35 of the Specific Relief Act.

Even if there was any misrepresentation the contract is not voidable for the plaintiff had the means of discovering the truth with ordinary diligence. S. 19 of the Contract Act (Exception). The plaintiff could have discovered the truth if he was so minded.

Babu Hira Lal Sanyal, in reply.

HOLMWOOD AND CHAPMAN JJ. This second appeal arises out of a suit brought by the plaintiff for rescission of a contract and for return of half-notes to the value of 1,400 rupees; in the alternative if it be found by the Court that the defendant had transferable *chukani* right in the land in suit and if it be held that the plaintiff is bound according to law to purchase the said land from the defendant, then the defendant may be directed to execute a conveyance in respect of the said land containing lawful and proper terms.

The case in the first Court was considered on six issues that were framed and it is a curious circumstance that in both the Courts below this case has been decided exclusively on a consideration of the 6th issue which carefully avoids all the real points which arise in the case. That issue is whether the defendant has got any interest in the property proposed to be sold, and if so, whether that interest is transferable. Now without framing that issue at all it is obvious both upon the pleadings and upon the facts that the defendant has got an interest in the property and that that interest is transferable. But the question which

arises in this case is whether he had represented that interest to be other than it really was and whether he thereby had deceived the plaintiff into buying what he had no intention of buying.

The simple questions, which the Subordinate Judge says are immaterial, raised in the 2nd, 3rd, 4th and 5th issues really entitle the plaintiff to have this question of misrepresentation discussed, because if he was deceived he is entitled to receive back the other halves of the currency notes, and the defendant is not entitled to receive the remainder of the consideration, and the plaintiff could not be barred by estoppel from rescinding the contract, if the contract was based on misrepresentation.

The question whether the plaintiff was deceived is one which largely rests upon the question of the *chukani* right. This the Subordinate Judge in the first Court has clearly decided erroneously. He says chukani right is not equivalent to occupancy right nor to *mokarari istemrari*, it always denotes a temporary right. But we have been asked to hold he was right on the authority of certain passages in Dr. W. W. Hunter's Gazetteer for the district of Rungpur. Unfortunately those passages are self-contradictory and carry with them their own refutation. Dr. Hunter says *chukanidars* are under-tenants who hold their lands from cultivators of a higher class and can be ejected at the will of the superior tenant. He gives no authority for the statement. In another passage he speaks of *chukanidars* as *mokararidars*. We prefer to follow a far higher authority Dr. Field who went into the matter extremely carefully, collected a most valuable table of all the various tenures in Bengal, and specially dealt with the rights of *jotedars* and *chukanidars* under them in the district of Rungpur, from which this case comes. Citing the

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report of the Rent Commission in 1876 it is said that "a large majority of jotedars have small holdings and are raiyats proper. But a large number of jotedars have raiyats under them who are called either *chukanidars* or *korfa projas*. The *chukanidars* too have often raiyats under them, and in some cases, especially in the larger jotes there are four or more degrees before you get to the actual cultivators. Jotes are saleable quite irrespective of the term during which they have been held, whether jotes held direct from the zamindar or *chukani jotes* which are held from a jotedar. There is therefore a permanent element in these *chukani* rights which may develop into an occupancy right and they are freely saleable even before they develop into occupancy rights." In this case if the defendant had such a right, it must have already matured into an occupancy right, inasmuch as he had held this *chukani* or so-called *chukani* for more than 12 years.

The learned Judge in appeal says nothing about *chukani* rights; but he finds as a fact that the defendant never had anything but a yearly tenancy created for one year for the purpose of building temporary dwelling-houses and carrying on jute business, and that lease stood in the name of the defendants' brother who is dead, and the defendant is his heir. The defendant continued to hold it after the expiration of the lease and no new lease was ever granted. The plaintiff appears to have held this land or a portion of it on a sub-lease for 9 years. But on this finding it is clear that the tenancy is a precarious one, and that under the Transfer of Property Act the defendant and his vendee would be liable to be ejected on six months' notice at the end of any year of tenancy. This certainly is not a *chukani* right. It is urged that the defendant's own pottah describes it as *chukani* right, and that the plaintiff cannot have been deceived, and

with due diligence he could have discovered what the real right was.

The question which really arises in this case is; did the defendant deceive the plaintiff by holding out to him according to the words of his own written statement that he had a *chuk mi* right for sale, which he was willing to let the plaintiff purchase for the purpose of permanently settling his nephew on the land, when he had in reality nothing but a leasehold from year to year transferable only under the Transfer of Property Act. It is clear from the written statement that the defendant knew that the plaintiffs' intention was to permanently settle his nephew upon this land after the purchase; and it has always been held as laid down in the case of *Flight* v. *Barton* (1), that if the vendor be informed by the purchaser of his object in buying and the lease contains covenants which will defeat that object, mere silence will in equity be equivalent to misrepresentation; in other words the defendant was bound to disclose to the plaintiff that the word *chukani* in his lease had no meaning or at any rate not the meaning which persons residing in the Rungpur district are entitled to attach to it. But this question can only be decided by a consideration of the various documents in the case which we are surprised to see the lower Courts do not appear to have taken any notice of with the exception of the defendant's pottah. These documents are the title-deeds of the Shahs, the defendant's title-deeds the kabala itself and the correspondence between the parties. These documents have not been printed in the paper-book probably because the lower Courts did not refer to them. But it is obvious that the question whether the defendant deceived the plaintiff cannot

(1) (1832) 3 My. & K. 282.

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be decided without further reference to all these matters.

The case therefore must go back for consideration of this point. If it be found that the defendant had nothing but a leasehold right from year to year under the Transfer of Property Act, and if the kabala and the correspondence show that he purported to sell the *chukani* right and not merely the right he acquired from the Shahs, whatever that right might be, then the defendant must be held to be guilty of fraudulent concealment and the plaintiff is entitled to have his half-notes back and cancel the contract. If on the other hand it be held that the defendant has *chukani* right as defined by Dr. Field and as generally recognised in the Rungpur district, or that the plaintiff had full knowledge that what is described as *chukani* right in the pottah of the defendant was nothing more than a transferable yearly tenancy for non-agricul tural purposes, then the plaintiff cannot succeed. As regards the contention that the plaintiff had the means to discover the truth with ordinary diligence we may again point out that if the use of the word *chukani* in the defendant's title-deeds misled the plaintiff, or if as the plaintiff says, the defendant refused to show him his title-deeds, then the exception to section 19 of the Contract Act does not apply.

The case will go back to the lower Court to be decided with reference to the directions we have given in this judgment. The lower Court will not take any further evidence but will consider the evidence and the documents that are already on the record. The costs will abide the result.

Case remanded.

S. K. B.

APPELLATE CIVIL.

Before Jenkins C.J., and Woodroffe J.

ABDULLAH HOSSEIN CHOWDHURY

v.

ADMINISTRATOR-GENERAL OF BENGAL.*

1914

May 5.

Leave to appeal to Privy Council—Application—Civil Procedure Code (Act V of 1908) s. 110—Computation of time—Limitation Act (IX of 1908) s. 12, whether ultra vires—Legislative powers of the Governor-General in Council—Order in Council, 1838—Government of India Act, 1858 (21 & 22 Vict. c. 106) s. 64—Indian Councils Act, 1861 (24 & 25 Vict. c. 67)—Letters Patent 1865 ss. 39, 44.

Section 12 of the Limitation Act of 1908 applies to applications for leave to appeal to His Majesty in Council.

Section 12, sub-cl. (*2*) which enacts that "in computing the period of limitation prescribed for an application for leave to appeal . . . the time requisite for obtaining a copy of the decree . . . appealed from . . . shall be excluded" was within the legislative powers of the Governor-General in Council, not being in contravention of section 64 of the Government of India Act 1858, and is not *ultra vires*.

Eastern Mortgage and Agency Company, Limited v. *Purna Chandra Sarbagna* (1), *Lakshmanan* v. *Peryasami* (2), *Anderson* v. *Periasami* (3), *In re Sita Ram Kesho* (4), *Thurai Rajah* v. *Jainilabdeen Rowthan* (5), *Moroba Ramchandra* v. *Ghanasham Nilkant Nadkarni* (6), *Motichand* v. *Ganga Parshad Singh* (7) referred to.

APPLICATION by the plaintiff, Abdullah Hossein Chowdhury, for leave to appeal to His Majesty in Council from the judgment of Coxe and Ray JJ. (8).

* Application for leave to appeal to His Majesty in Council, No. 85 of 1913.

(1) (1912) I. L. R. 39 Calc. 510.
(2) (1887) I. L. R. 10 Mad. 373.
(3) (1891) I. L. R. 15 Mad. 169.
(4) (1892) I. L. R. 15 All. 14.
(5) (1895) I. L. R. 18 Mad. 484.
(6) (1894) I. L. R. 19 Bom. 301
(7) (1901) I. L. R. 24 All. 174; L. R. 29 I. A. 40, 42.
(8) (1913) I. L. R. 41 Calc. 148.

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It was conceded that if the application was within time a certificate should issue. The only question was whether the application was within time. By an order in Council, dated the 10th April 1838, it was declared "that from and after the 31st day of December next, no appeal to Her Majesty, her heirs and successors in Council, shall be allowed by any of Her Majesty's Supreme Courts of Judicature at Fort William in Bengal . . . . . unless the petition for that purpose be presented within six calendar months from the day of the date of the judgment, decree or decretal order complained of, and unless the value of the matter in dispute shall amount to the sum of ten thousand Company's rupees at least . . . ." See Safford and Wheeler's Privy Council Practice, p. 491.

By section 12, sub. cl. (2) of the Limitation Act of 1908 it was provided that "in computing the period of limitation prescribed for . . . . . an application for leave to appeal . . . . the time requisite for obtaining a copy of the decree . . . . appealed from . . . shall be excluded."

The petition for leave was presented more than six calendar months from the date of the decree, but if in computing the period of limitation, the time requisite for obtaining a copy of the decree was excluded, the application was within time. The question was, should such time be excluded in computing the period of limitation and resolved itself into the consideration of whether section 12, sub. cl. (2) of the Limitation Act of 1908 as set out above was *ultra vires* having regard to the declaration contained in the Order in Council of 1838.

Babu Gunada Charan Sen, for the petitioner, applied for leave to appeal to His Majesty in Council.

Mr. B. Chakravarti (with him *Babu Upendra Lal Roy* and *Babu Bhupendra Chandra Guha*), for the opposite party. The application for leave is out of time and ought to be refused. Sections 5 and 12 of the Limitation Act 1908 which purport to extend the time during which such an application must be made, are to that extent *ultra vires*: See Safford and Wheeler's Privy Council Practice, pp. 465-466, p. 476 note (*s*). The order in Council of the 10th April 1838 is definite in its prohibition. The provisions of the Order in Council of 1838 were revived and confirmed by section 64 of the Government of India Act, 1858 (21 and 22 Vict., c. 106): and by section 22 of the Indian Councils Act, 1861, (24 & 25 Vict., c. 67), it it was provided that "the Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect . . . . . any of the provisions of 21 & 22 Vict., c. 106, entitled An Act for the Better Government of India . . . . ". Cf. Ilbert's Government of India, 2nd edition, p. 199. It follows that sections 5 and 12 of the Limitation Act (which was passed by the Governor-General in Council) are *ultra vires* so far as they are in conflict with the order in Council of 1838. It cannot be said that the prohibition is an interference with the prerogative of the Crown, to receive any petition. The order prohibits the presentation of an application to the High Court for leave to appeal to His Majesty in Council—it leaves His Majesty in Council unfettered. This distinction is recognised in section 112 of the Code of Civil Procedure.

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers:" *The Queen*

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v. *Burah* (1). The very point involved in this matter was raised in *Gajadhur Pershad* v. *The Widows of Imam Ali Beg* (2). Under the Limitation Act of 1877, the time within which the application for leave to appeal to the Privy Council, had to be made was six months from the decree: *Moroba Ramchandra* v. *Ghanasham Nilkant Nadkarni* (3), *In the matter of petition of Sita Ram Kesho* (4), *Jawahir Lal* v. *Narain Das* (5). The following authorities were also referred to: *Kirkland* v. *Modee Pestonjee Khoorsedjee* (6), *The East India Company* v. *Syed Ally* (7), *In the matter of the petition of Feda Hossein* (8), *Alter Caufman* v. *Government of Bombay* (9). It is clear from the authorities that section 5 of the Limitation Act of 1877 does not apply to applications for leave to appeal to the Privy Council. The decision in *Eastern Mortgage Agency Co. Ld.* v. *Purna Chandra Sarbagna* (10) which was under section 12 of the Limitation Act of 1908, cannot be taken as binding, as the present argument was not advanced or considered in that case. There is no reason why the time requisite for obtaining a copy of the decree should be excluded, as it is not necessary to file a copy of the judgment of the High Court at the time of presenting the petition. It is true it has been the practice to exclude such time, in computing the period of limitation: but the present objection has never before been urged and the matter is one of first impression. The amendments introduced in sections 5 and 12 by the Limitation Act of 1908 have given rise to the present question. Field's Regulations of the Bengal Code p. 139, and Morley's Digest, Vol. I., p. CXXXV, were also referred to.

(1) (1878) L. R. 5 I. A. 178, 193.
(2) (1875) 15 B. L. R. 221.
(3) (1894) I. L. R. 19 Bom. 301.
(4) (1892) I. L. R. 15 All. 14.
(5) (1878) I. L. R. 1 All. 644.
(6) (1843) 3 Moo. I. A. 220.
(7) (1827) 7 Moo. E. I. A. 555.
(8) (1876) I. L. R. 1 Calc. 431.
(9) (1894) I. L. R. 18 Bom. 636.
(10) (1912) I. L. R. 39 Calc. 510.

Babu Gunada Charan Sen, for the petitioner. The Indian Legislature was entirely competent to pass section 12, sub-section (*2*) of the Limitation Act of 1908. The legislative powers of the Indian Legislature are defined by section 22 of the Indian Councils Act, 1861 (24 & 25 Vict., c. 67). It is true that one of the exceptions provided by that section is the Government of India Act 1858 (21 & 22 Vict., c. 106). But that exception does not operate to affect the matter in issue in the present application. The object of the Government of India Act 1858, as appears from the title, the preamble and the various provisions of the Act, was to regulate the administrative government of India and not to regulate the procedure of the Courts. The object was in particular to provide for the transfer of the government of this country from the East India Company to the Crown and to make the necessary administrative changes for that purpose. Section 64 refers to the Charter granted to the East India Company and the executive and administrative government of India and does not purport to fetter the absolute right of the Indian Legislature to pass any Act relating to the administration of justice, or the procedure of the Courts. The matter is placed beyond doubt by section 11 of the Charter Act of 1861 (24 & 25 Vict., c. 104) which was passed in the same year as the Indian Councils Act which authorised the establishment of the High Courts in India and defined their jurisdiction. By section 11 "all provisions then in force in India of Acts of Parliament, or of any orders of Her Majesty in Council or . . . . . shall be taken to be applicable to the said High Courts . . . . so far as may be consistent with the provisions of this Act and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers in relation to

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the matters aforesaid of the Governor-General of India in Council." *See* also section 9. The Letters Patent of the Calcutta High Court issued in 1865 in pursuance of the Charter Act, by section 39 provides for appeals to the Privy Council and by section 44 provides that "all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Council." Notwithstanding the Order in Council of 1838 variations have been introduced in respect of cases falling within the second clause of section 110 of the Code of Civil Procedure. This has presumably been done by virtue of the authority of the Charter Act 1861.

[JENKINS C.J. What is the history of Art. 179 of the Limitation Act of 1908?]

The provision originally appeared in the Privy Council Appeals Act (VI of 1874): section 8 was as follows: "Such application must ordinarily be made within six months from the date of such decree. But if that period expires when the Court is closed, the application may be made on the day that the Court re-opens." This Act was repealed by the Code (Act X of 1877): but section 599 of the Code of 1877 reproduced that provision *verbatim*. Section 599 was repealed by the Limitation Act (XV of 1877), but the same period of limitation namely, six months from the date of the decree appealed against, is prescribed by Art. 177 of the Limitation Act of 1877—and the same period is prescribed by Art 179 of the Limitation Act of 1908. It is to be observed if section 12 of the Limitation Act of 1908 be *ultra vires*, so must section 8 of the Privy Councils Act of 1874 have been *ultra vires*. I rely on *Eastern Mortgage & Agency Co., Ld.* v. *Purna Chandra Sarbagna* (1) which was a decision under section 12 of the Limitation

(1) (1912) I. L. R. 39 Calc. 510.

Act of 1908. Although the point involved in the present application was raised in argument in *Gajadhur Pershad* v. *The Widows of Emam Ali Beg* (1), no decision was come to. The case turned on a question of irregularity. The other authorities cited by the opposite party were decisions under the Limitation Act of 1877 and hence inapplicable.

Mr. Chakravarti, in reply.

Cur. adv. vult.

JENKINS C. J. This is an application by one who desires to appeal to His Majesty in Council for a certificate that as regards amount or value and nature the case fulfils the requirements of section 110 of the Civil Procedure Code.

It is conceded that if the application is within time a certificate ought to issue : it is however contended that the appeal is not within the period of six calendar months prescribed by the Order in Council of 1838. To this it is answered that the application is within six months from the date of the decree appealed from, if, in computing the period of limitation the time requisite for obtaining a copy of the decree is excluded.

The Order in Council does not expressly allow this exclusion; but the Limitation Act of 1908, section 12, purports to direct it. The question for our decision is whether it was within the competence of the Indian Legislature to enact this provision. The Governor-General in Council has power at legislative meetings to make laws for all Courts within British India subject to certain exceptions, and among them is this that he cannot make any law repealing or affecting any provision of the Government of India Act 1858. (*See* the Indian Councils Act 24 & 25 Vict., c. 67, s. 22.)

(1) (1875) 15 B. L. R. 221.

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Section 64 of the Government of India Act, 1858, provides that all Acts and provisions now in force under Charter or otherwise concerning India shall subject to the provisions of this Act continue in force and be construed as referring to the Secretary of State in Council in the place of the said Company and the Court of Directors and Court of Proprietors thereof.

Therefore, it is contended, section 12 of the Limitation Act so far as it relates to an application for leave to appeal to His Majesty in Council was beyond the powers of the Indian Legislature.

This section is not the first instance in which the Indian Legislature has made provisions which purport to modify the absolute terms of the order of 1838. Thus by the Privy Council Appeals Act, 1874, it was provided that applications by any one desiring to appeal to Her Majesty in Council must *ordinarily* be made within six months from the date of the decree; but if that period expired when the Court was closed the application might be made on the day the Court re-opened (*see* section 8). The Bill which afterwards became this Act is said to have been submitted to and approved by the Judicial Committee (*see* note in Whitley Stoke's Anglo-Indian Codes, Vol. II, page 435).

I have looked further into this, and found a statement by Mr. Arthur Hobhouse, as he then was, which fully bears out this note. Addressing the Governor-General's Council he said, "the Bill was now put into a shape which was acceptable to the Judicial Committee of the Privy Council. The Secretary of State had been in correspondence with the Judicial Committee at our desire and they had approved of the Bill as it stood."

This provision was repeated in the Codes of 1877 and 1882 (*see* section 599), and though the section?

the Code of 1882 was repealed in 1888 that was not, as I understand, by reason of any doubt as to the competence of the Indian Legislature.

By the Limitation Act of 1877 it was provided that an application for the admission of an appeal to Her Majesty in Council should be presented within six months from the date of the decree appealed against (Article 177).

Though an opinion was once expressed that this provision was repealed by the Code of 1882, *Fazul-un-nissa* v. *Mulo* (1) no doubt seems ever to have been entertained as to the power of the Indian Legislature to deal with this subject : *Lakshmanan* v. *Peryasami* (2), *Anderson* v. *Periasami* (3), *In re Sita Ram Kesho* (4), *Thurai Raiah* v. *Jainilabdeen Rowthan* (5), *Moroba Ramchandra* v. *Ghanasham Nilkant Nadkarni* (6). Prior to 1874 the more general view in this Court seems to have been that when the time for appealing expired in vacation the petition could not be presented on the day the Court re-opened [*Tamvaco* v. *Skinner* (7)]. But I find that it has now become the established practice to receive an application made on the day the Court re-opens though beyond the prescribed six months, and this has been in reliance on section 8 of the Privy Council Appeals Act 1874 and of the provisions that have taken its place in the Code and the Limitation Acts.

It is true that neither the 2nd clause of section 5 nor the 2nd para. of section 12 of the Limitation Act of 1877 has been applied to an application for leave to appeal to His Majesty in Council, but that is because an application for that purpose did not come

(1) (1884) I. L. R. 6 All. 250.
(2) (1887) I. L. R. 10 Mad. 373.
(3) (1891) I. L. R. 15 Mad. 169.
(4) (1892) I. L. R. 15 All. 14.
(5) (1895) I. L. R. 18 Mad. 484.
(6) (1894) I. L. R. 19 Bom. 301.
(7) (1867) I. B. L. R. (O. C.) 39.

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within the terms of either section. The Limitation Act of 1908 has been extended to such an application. I do not rely on the decision in *Eastern Mortgage and Agency Co., Ld.* v. *Purna Chandra Sarbagna* (1). as showing that this extension was valid as the objection to the powers of the Indian Legislature was not advanced in that case. This is the first occasion on which the point has been taken. But if section 8 of the Privy Council Act of 1874 was within the competence of the Indian Legislature, I think section 12 of the Limitation Act of 1908 must equally have been within its powers. And I have shown that there is strong reason for thinking that section 8 was valid legislation.

The Court's power to deal with applications for leave to appeal rests primarily on clause 39 of the Letters Patent, which ordains that any person may appeal to the Privy Council in the cases there mentioned: "Subject always to such rules and orders as are now in force or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the said Presidency; except so far as the said existing rules and orders are hereby varied and subject also to such further rules and orders as We may with the advice of Our Privy Council hereafter make in that behalf."

Clause 44 of the Letters Patent is in these terms:— "And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations, ... and may be in all respects amended and altered thereby."

Apart from section 64 of the Government of India Act 1858 there would seem to be no bar to the

(1) (1912) I. L. R. 39 Calc. 510.

legislation under consideration. Even if it be that legislation regarding the admission of appeals affects the prerogative of the Crown [see *Moti Chand* v. *Ganga Parshad Singh* (1)], still it would not be deemed invalid by reason of that only though subject to the power of disallowance by the Crown. Nor do I think the enactment of section 12 of the Limitation Act, 1908, so far as it relates to applications for leave to appeal to His Majesty in Council, is forbidden by section 64 of the Government of India Act, 1858. The whole section must be read, and it must be borne in mind that it is a part of an Act dealing with the transfer to the Crown of the Government of India.

The conclusion then to which I come is that section 12 of the Limitation Act of 1908 was within the legislative powers of the Government of India, and that the present application is within time. A certificate, must, therefore, issue that as regards amount or value and nature the case fulfils the requirements of section 110 of the Code.

The respondent must bear the costs of this application.

WOODROFFE J. I agree.

Certificate granted.

J. C.

(1) (1901) I. L. R. 24 All. 174 ; L. R. 29 I. A. 40, 42.

PRIVY COUNCIL.

* *P.C.*
1914

April 20;
May 11.

PAUL
v.
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[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Easement—Light and Air—Ancient light, infringement of—Nuisance—Measure of right—Requirement of light for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind—Concurrent findings of fact—Grounds of appeal relating not to fact, but to pure question of law.

In this case which was an appeal in an action for damages for the infringement of the appellants' alleged rights of light and air, the Judicial Committee held that though there were concurrent findings of fact in the Courts below, yet the grounds of appeal did not relate to those findings but to the question whether the Courts below had taken the proper view of the legal rights of the appellants, and whether, accordingly, the test which they had applied on the question of the infringement of the appellants' rights was the correct one. That was a pure question of law which admittedly turned upon the interpretation to be given to the decision of the House of Lords in *Colls* v. *The Home and Colonial Stores* (1), when considered in connection with the late decision of the House of Lords in *Jolly* v. *Kine* (2).

Held, further, that in *Colls' Case* (1) the legal test in such an action was formulated by Lord Davey as being that "the owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind. . . . The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance." And the House of Lords in that case adopted that formulation of the law.

* *Present*: Lord Dunedin, Lord Moulton, Sir John Edge, and Mr. Ameer Ali.

(1) [1904] A. C. 179. (2) [1907] A. C. 1.

In the judgment of the House of the Lords in *Colly* v. *Kine* (1) there was an authoritative exposition of the decision in *Colls' Case* (2), and it was established that the law as stated by Lord Davey is the law as laid down by that decision, and that it accurately formulated the law on the subject. In the High Court, in the present case the Court of first instance adopted Lord Davey's opinion, and applied it consistently to the findings of fact to which he came ; and the Appellate Court had substantially taken the same test. Their Lordships, therefore, affirmed the judgments of the Courts below, and dismissed the appeal.

APPEAL 17 of 1913 from a judgment and decree (1st August 1911) of the High Court at Calcutta in its Appellate Civil Jurisdiction, which affirmed a judgment and decree (29th March 1911) of Stephen J. a Judge of the same Court in its ordinary original jurisdiction.

The plaintiffs were appellants to His Majesty in Council.

The main question for determination in this appeal was to the whether the appellants were entitled to relief by injunction or damages for an alleged interference with their rights to access of light and air to their house and premises 7, Esplanade East, in Calcutta.

The facts are fully stated, and the judgments of the Courts are set out in the report of the hearing of the case on appeal to the High Court (Sir LAWRENCE JENKINS C. J. and WOODROFFE J.) which will be found in I. L. R. 39 Calc. 59.

On this appeal,

De Gruyther K. C. and *A. M. Dunne*, for the respondents, took a preliminary objection to the hearing of the appeal on the ground that the Appellate Court had affirmed the decision of the first Court, and there were concurrent findings of fact by both Courts that no actionable nuisance had been proved, and that no damage had been sustained by the appellants by

(1) [1907] A. C. 1 (2) [1904] A. C. 179.

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reason of the depreciation in value of their house and premises; and there was no substantial question of law; it was submitted, therefore, that no appeal lay. Reference was made to the Civil Procedure Code (Act V of 1908) section 110; *Sajjad Husain* v. *Wazir Ali Khan* (1); and *Karuppanan Servai* v. *Srinivasan Chetti* (2). Reference was made on the merits of the case to *Colls* v. *Home and Colonial Stores* (3); *Higgins* v. *Betts* (4) and *Jolly* v. *Kine* (5); it being contended that the principles of law applicable to the present case, which were laid down in those cases, had been rightly applied by the High Court: and that the appellants had failed to establish any ground for the relief sought by them.

Upjohn K.C., *Hudson K.C.* and *W. E. Vernon*, for the appellants, contended that the evidence in the case clearly proved that the respondents' new building caused a nuisance or illegal obstruction to the appellants' ancient windows; that by reason of the erection of the building the appellants' premises had been, to a substantial degree, rendered less fit for the purpose of busines or occupation; that such erection had sensibly interfered, according to the ordinary notions of mankind, with the comfort and convenience of the appellants' building as a residence, and its usefulness as a place of business; and that the question whether sufficient light was left for the purposes of a dwelling house and place of business was not the test to be applied in order to ascertain whether the respondents' buildings constituted an actionable nuisance; but the test was whether there had been a diminution of light caused sufficient to amount to a nuisance. The

(1) (1912) I. L. R. 34 All. 455: L. R. 39 I. A. 157.
(2) (1901) I. L. R. 25 Mad. 215: L. R. 29 I. A. 38.
(3) [1904] A. C. 179.
(4) [1905] 2 Ch. 210.
(5) [1907] A. C. 1.

arguments were based on *Colls* v. *Home and Colonial Stores* (1) and *Kine* v. *Jolly* (2) and, on appeal, *Jolly* v. *Kine* (3); and it was contended that as to what was the proper test the Judges in those cases had differed in opinion, and that the decision on the question in the former case had not been altogether supported by the Court of Appeal or in the latter case on appeal. The proper test had not been applied to the present case by the High Court, which had therefore not taken a proper view of the appellants' rights. *Griffiths* v. *Richard Clay and Sons, Limited*(4) was also referred to. The appellants, it was submitted, had a cause of action against the respondents, and were entitled to damages for the injury caused to their rights.

The respondents were not further heard.

The judgment of their Lordships was delivered by

May 11.

LORD MOULTON. The action in which the present appeal is brought is an action in which the appellants sued the respondents for infringement of certain rights of light possessed by them in connection with premises known as 7, Esplanade East, Calcutta, of which they owned the freehold. The respondents had erected a building known as 8, Esplanade East, Calcutta, lying to the east of the appellant's premises and so situated that the western walls of the respondents' buildings were parallel to and at a distance of 17 feet from the eastern wall of the appellants' building. The ground on which the respondents' building was erected had for more than 20 years previously been occupied by much lower buildings, and it is conceded that the appellants had acquired rights of light thereby for the windows on ths east side of their

(1) [1904] A. C. 179.
(2) [1905] 1 Ch. 480, 481, 493.
(3) [1907] A. C. 1.
(4) [1912] 2 Ch. 291 298.

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premises. The new buildings of the respondents greatly exceed in height the former buildings upon the site and decreased the amount of light coming to the eastern windows of the appellants, and it is in respect of this interference with the access of light to their windows that the appellants brought the action.

The action came on for trial with witnesses before the Hon. Mr. Justice Stephen, sitting as a Judge of the High Court of Judicature at Fort William in Bengal, in its ordinary civil jurisdiction, and on the 29th day of March 1911 he gave judgment dismissing the action. An appeal was brought from that judgment to the High Court of Judicature at Fort William in Bengal in its appellate jurisdiction, and on the 1st day of August 1911 judgment was delivered by that Court dismissing the appeal. It is from this judgment that the present appeal is brought.

Both in the Court of first instance and in the Court of Appeal the facts of the case are dealt with in detail, and clear findings are given on all relevant points of fact. Their Lordships can find no material difference between the views taken by the two Courts on these points of fact, though the expressions used may not be in all cases identical. Their Lordships therefore would feel justified in holding, if it were necessary, that this is a case of concurrent findings of fact. But in truth the grounds of appeal do not relate to these findings of fact, but to the question whether the Courts below have taken the proper view of the legal rights of the appellants, and whether accordingly, the test which they applied as to whether those rights had been infringed was the correct one. This is a pure question of law, and it was admitted by counsel for the appellants that it practically turns upon the interpretation to be given to the well-known decision of the House of Lords in the case of *Colls* v.

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The Home and Colonial Stores (1), when considered in connection with the later decision of the House of Lords in *Jolly* v. *Kine* (2).

Their Lordships do not consider that it is either necessary or profitable to go into the history of the divergent views in respect of the nature and extent of rights of light acquired by prescription that prevailed in the Courts prior to the decision in *Colls's Case* (1). It suffices to say that one stream of authorities gave countenance to the view that by the enjoyment of light for a period of 20 years, there could be acquired an indefeasible right to the enjoyment of a like amount of light in the future. The conflicting stream of authorities countenanced the view that nothing constituted an infringement of rights of light which did not amount to an actionable nuisance, so that the amplitude of previous enjoyment was no measure of the rights acquired thereby. This conflict of views was fully recognised by the noble Lords who took part in the decision of *Colls's Case* (1), and there can be no doubt that it was their intention to decide between them, and to lay down the law in such a manner as to prevent uncertainty in the future.

Mr. Justice Stephen takes, as expressing the law laid down by this decision, the following quotation from the opinion of Lord Davey in that case :—

> "The owner . . . . of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind . . . . The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance?"

And the Court of Appeal, although they do not so directly base their judgment on the above passage in Lord Davey's opinion, appear to their Lordships to

(1) [1904] A. C. 179. (2) [1907] A. C. 1.

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have substantially taken the same test. But in their Lordships' opinion it is not necessary to examine minutely the verbal differences between the expressions used in the Court of Appeal and by the Judge of first instance. They accept in full the findings on fact of the Judge of first instance, and they are of opinion that he has consistently applied to them the legal test above formulated. The only question therefore is whether it accurately formulates the law on the subject.

It is evident on reading the opinion of Lord Davey that he intended the passage to be a precise formulation of the rights of a dominant tenement in respect of ancient lights, and his opinion was formally accepted by Lord Robertson who also took part in the decision. The opinion of the Lord Chancellor in that case is equally clear on the essential points that the easement acquired by ancient lights is not measured by the amount of light enjoyed during the period of prescription, and that there is no infringement unless that which is done amounts to a nuisance. It has been suggested that a different view is to be found in the opinions of Lord Macnaghten and Lord Lindley, but although there are passages in these opinions which might if they stood alone indicate that those noble Lords considered that to some extent the amount of light enjoyed in the past might influence the rights acquired for the future, there is no reason to think there was any intention on the part of those noble Lords to differ from the conclusions of their colleagues. It must be taken therefore that the House of Lords adopted the formulation of the law given by Lord Davey as above mentioned.

But if any doubt remained on the point it is in their Lordships' opinion set at rest by a consideration of the subsequent decision of the House of Lords in

the case of *Jolly* v. *Kine* (1). In that case Mr. Justice Kekewich had found as a fact that the obstruction amounted to a nuisance, but in the course of his judgment said that the room affected was "still a well-lighted room." He gave judgment for the plaintiff. On appeal to the Court of Appeal there was a division of opinion among the judges. Romer, L.J., held that under the decision in *Colls's Case* (2) the finding that it was still a well-lighted room was fatal to the plaintiffs' claim. Vaughan Williams and Cozens Hardy, L.JJ., held to the contrary. On appeal to the House of Lords their Lordships were equally divided and accordingly the appeal was dismissed. But this division of opinion was not due to any doubt as to the law to be applied. The Lord Chancellor gives his opinion on the law as laid down in *Colls's Case* (2) in the following words :—

"The right of the owner or occupier of a dominant tenement to light is based upon the principle stated by Lord Hardwicke in 1752, in *Fishmongers' Company* v. *East India Company* (3), that he is not to be molested by what would be equivalent to a nuisance. He does not obtain by his easement a right to all the light he has enjoyed. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings. That is the basis on which the decision of this House proceeded."

Lord James of Hereford concurred in the judgment delivered by the Lord Chancellor.

These were the judgments of the two noble Lords who were in favour of dismissing the appeal. On the other hand, Lord Robertson was of opinion that the appeal should be allowed and in his opinion says :—

"I adhere, as I did in *Colls's Case* (2) to the definition given by Lord Davey in entire accordance with the judgments of the other noble and learned Lords. According to that definition the quantity of light to which

(1) [1907] A. C. 1. (2) [1904] A. C. 179.
(3) (1752) 1 Dick. 163.

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right is acquired in 20 years is 'what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind'"

Lord Atkinson, who was the other member of the Court, was also in favour of allowing the appeal, and referring to the decision in *Colls's Case* (1) he says:—

"It would appear to me that that case established the principle that there must be an invasion of the legal right of the owner of the dominant tenement sufficient to amount to a nuisance in order to give him a right of action, and that as long as he receives through the windows of his dwelling-house, or in the case of a particular room in his dwelling-house, through the windows of that room, an amount of light which, to use the words of James, L.J., in *Kelk* v. *Pearson* (2) is 'sufficien' according to the ordinary notions of mankind for the comfortable use and enjoyment' of his dwelling-house, or of the room in it, as the case may be, no nuisance has as regards him been created, and no legal wrong has been inflicted upon him."

And although he does not expressly repeat the well-known passage from Lord Davey's opinion in *Colls's Case* (1) he shows by the language which he uses that he thoroughly agrees with it, and says that to him it appears to be of general application.

In the judgment of the House of Lords in *Jolly* v. *Kine* (3) there is therefore an authoritative exposition of the decision in *Colls's Case* (1), and it is established that the law as formulated by Lord Davey is the law laid down by that decision. It is somewhat remarkable therefore that counsel for the appellants should have sought to treat the decision in *Jolly* v. *Kine* (3) as throwing some doubt upon the interpretation of the decision in *Colls's Case* (1), operating, if such an expression could be used, to weaken it in the direction of directing that regard should be had to the extent of previous enjoyment of light. The only explanation of such a view is that the appeal was in the end dismissed, inasmuch as the House was equally divided. But this

(1) [1904] A. C. 179. (2) (1871) L. R. 6 Ch. App. 809.
(3) [1907] A. C. 1.

was in no way due to any difference of opinion as to the law, but to the fact that the Lord Chancellor felt himself entitled to disregard the finding that the room was "still a well-lighted room" in the sense which those words would naturally convey and to hold them as meaning that it would have been considered to be well-lighted according to the standard of a crowded city." His Lordship was led to this conclusion by passages in the evidence and the context of Mr. Justice Kekewich's judgment. It was on this ground alone that he was in favour of dismissing the appeal, and therefore the actual result in that case has no bearing on its effect as an authoritative explanation of the law laid down in *Colls's Case* (1).

Their Lordships are therefore of opinion that the learned Judge at the trial took the proper test as to whether or not there had been an infringement of the rights of the appellants and that he applied it correctly to the facts of the case. They are therefore of opinion that his judgment was right and that the Court of Appeal was right in affirming it, and they will humbly advise His Majesty that the present appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: *Westbury, Preston, & Stavridi.*

Solicitors for the respondents, the Members of Mackintosh Burn & Co.: *Watkins & Hunter.*

(1) [1904] A. C. 179.

J. V. W.

PRIVY COUNCIL.

P.C.[3]
1914

April 21, 22;
May 11.

BIJRAJ NOPANI

v.

PURA SUNDARY DASEE.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Vendor and Purchaser—Conveyance by executor as beneficial owner—Construction of deed of sale—Inconsistency between recitals and operative part of deed—Omission to state expressly that he was conveying the property sold in his capacity of executor.

Held (reversing the appellate decision of the High Court, and restoring that of the first Court), that on the construction of a deed of sale, and on the evidence in, and under the circumstances of the case, the title vested in an executor passed to the appellants under the deed, by which he together with other vendors purported to convey "all his estate, right, title, claim, and demand whatsoever" in the property sold, although he did not expressly state therein that he was conveying the property in his capacity as executor. The plain legal interpretation of the deed should not be allowed to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some or all of the parties to the conveyance at the date of its execution. The deed stated plainly that whatever right or title the vendors possessed was to go to support the conveyance, and it is a settled rule that the meaning of a deed is to be decided by the language used interpreted in a natural sense.

APPEAL No. 99 of 1912 from a judgment and decree (25th January 1910) of the High Court at Calcutta in the appellate jurisdiction, reversed a judgment and decree (15th February 1909) of the same Court in the exercise of its ordinary original civil jurisdiction.

The defendants were the appellants to His Majesty in Council.

The main question for determination in the present appeal was whether the title vested in an executor

[3] *Present* : LORD DUNEDIN, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.

passed to the appellants under a conveyance executed by him, by which he conveyed "all his estate, right, title, claim and demand whatsoever," without expressly stating therein that he was conveying the property in his capacity as executor.

The facts are fully stated in the report of the case on appeal before the High Court (SIR LAWRENCE JENKINS C. J. and WOODROFFE J.) which will be found in I. L. R. 37 Calc. 362.

On this appeal,

Sir R. Finlay K. C. and *B. Dubé*, for the appellants, contended that there was in the will no restriction on the alienation of the property. The permission of the High Court was not necessary; the executor was mistaken in applying for it: *see* section 90 of the Probate and Administration Act (V of 1881). The fact that one of the vendors was an executor made no difference to the transaction; his failure to describe himself as executor did not affect the sale: the case of *Preonath Karar* v. *Surja Coomar Goswami* (1) was referred to. In the construction of the deed of sale there was no ambiguity in the disposing part of the deed as to what the vendors were selling; it was "all the estate, right, title, interest, claim and demand whatsoever of the vendors unto and upon" the property. That included, it was submitted, the right in the property of Hemendranath as executor of the will of Premchand Bysack. The property claimed was alleged to be *stridhan* property which the respondent inherited from her mother Katyani Dasi: *see* Mayne's Hindu Law, 7th Edn. page 900, paragraph 632; but she had failed to prove that her mother's title to the legacy in the will had been completed before her

(1) (1891) I. L. R. 19 Calc., 26.

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death by the assent of the executor to the legacy. The respondent was not equitably entitled to the relief claimed by her. In any case she was not entitled to recover her share of the house in dispute without paying her portion of the mortgage debt, and of the annuity discharged by the appellants. The decision of the Original Court (STEPHEN J.) was, it was contended, correct.

De Gruyther K. C. and *A. M. Dunne*, for the respondent, contended that she had established against the appellants her title to a moiety of the house and premises in dispute; and that the conveyance of 12th December 1900 did not pass or affect her right to the said moiety, The deed did not purport to convey any of the rights Hemendranath Bysack had as executor to the appellants. The executorship had in fact come to an end at the date of the deed; and the deed itself stated so. The deed of sale was executed 14 years after the death of the testator; and according to the statement in the petition for probate there were no debts payable by the testator. On the facts Hemendranath did not retain the property in his hands as executor. None of the three vendors, who purported to convey the property, had any title in it: the conveyance absolutely denies the respondent's title, and could not therefore convey her rights and interests. The vendors claimed title through Katyani Dasi who was a specific legatee, and the executor assented to the legacy, and therefore he had no title to this property which he could convey, because, on assenting, his title as executor was displaced and came to an end. The Probate and Administration Act (V of 1881) section 112 was referred to. [LORD MOULTON. That is a question of fact, and should have been raised in the Court of first instance]. The respondents were minors at the time.

Sir R. Finlay K. C., in reply. The point raised at the end of the argument for the respondent was not only not raised previously in the suit, but was absolutely inconsistent with the pleadings, where there was no mention of it; nor was it suggested in the grounds of appeal.

The judgment of their Lordships was delivered by

May 11.

LORD MOULTON. This is an appeal in a suit brought by the respondent against the appellants for a declaration of her title to an equal undivided half part or share in a certain house and premises known as 8, Sobharam Bysack's Street, Calcutta, and for recovery of the premises from the appellants, in whose possession they were at the commencement of the suit, with an inquiry as to *mesne* profits. The facts of the case, so far as they are material, are not now in dispute, and are as follows:—

The house and premises originally belonged to Prem Chand Bysack, who died on the 13th June 1886, leaving a will dated 25th October 1884. By his will the said testator devised and bequeathed the said house and premises "to his daughter, Katyani Dasee, and her heirs absolutely," subject to two charges of 20 rupees per month, payable to two of his daughters-in-law and their children as and for periods specified in the will. He appointed as executors Shambhoo Nath Bysack (the husband of his daughter Katyani Dasee), and two of her sons, Hemendra Nath Bysack and Ratanlal Bysack. On application for probate of this will, the executors found that a caveat had been entered by some of the relations of the deceased testator, who alleged that the will was a forgery. This led to a suit, where, after a prolonged inquiry, the Court, on the 16th May 1887, pronounced the will

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to be genuine and granted probate of it, and directed that the costs of the executors should be paid out of the testator's estate.

It would appear that the executors had no funds in hand out of which they could meet the costs of this litigation, and they therefore mortgaged the property for a sum of Rs. 3,950 to Dwarka Nath Dutt, who had been their attorney in the probate suit, in order to secure the payment of his costs, which amounted to Rs. 3,400, the balance, Rs. 550, being treated as a loan to them. Katyani Dasee was made a party to the mortgage bond apparently to put on record her wish that no portion of the estate should be sold to defray these costs. The term of the mortgage was 10 years.

Shambhoo Nath Bysack died in 1899, and Ratanlal Bysack died in 1891, leaving his brother Hemendra Nath Bysack sole surviving executor. In 1891 Katyani Dasee also died, leaving five sons and two unmarried daughters, of which the respondent was one.

In 1900 the heirs of Dwarka Nath Dutt, who had died in the meanwhile, instituted a suit against Hemendra Nath Bysack as sole surviving executor for sale of the property under their mortgage, and at the same time the two annuitants brought suits against him for arrears of their annuities. To meet these demands it was determined to sell the property, and accordingly by a deed, dated the 12th of December 1900, the property was sold to the appellant Bijraj Nopani, one of the appellants, and Dowlatram, since deceased. The other appellants are sued as the executors of his last will and testament, one of them being Biraj Nopani himself. It is on the interpretation of this deed of conveyance that the question now in issue depends, and in order to make clear the contentions of the two parties it is necessary to explain its

form and to state how the dispute has arisen before discussing the construction of the deed.

The deed is made between Hemendra Nath Bysack and his two surviving brothers of the first part, Baroda Sundary Dasee, one of the annuitants of the second part, and Bijraj and Dowlatram of the third part. It recites that the property originally belonged to Prem Chand Bysack, that he devised it to his daughter Katyani Dasee and her heirs absolutely, subject to a charge for annuities of Rs. 20 per month, to Baroda Sundary Dasee and Sonamoni Dasee respectively, and that he appointed Shambhoo Nath Bysack, Hemendra Nath Bysack, and Ratanlal Bysack executors of such will. It then recites the obtaining of probate of the will after suit. It then recites the death of Katyani Dasee on the 8th day of April 1891, leaving five sons and three daughters, and the death of two of the sons unmarried, and also the death of Shambhoo Nath Bysack on 9th January 1899.

There next comes a recital that Hemendra Nath Bysack on the 4th day of September 1900 obtained an order whereby it was referred to the Registrar of the High Court to enquire whether there was any necessity for the sale of the said house, and what provision should be made to secure the payment of the legacies mentioned in the said will out of the rents and profits of the house. It next recites that—

"the said Hemendra Nath Bysack, the sole surviving executor of the said will, has since paid all the debts, liabilities, and legacies mentioned in the said will."

Then follows a recital that Sonamoni Dasee has filed a suit against the said Hemendra Nath Bysack for, amongst other things, a declaration of her rights under the said will, and that the vendors have taken upon themselves the responsibility of entering satisfaction in the said suit, as also of satisfying the claims

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of any of their sisters, and that therefore the petition will not be proceeded with. There next comes a recital that the vendors have agreed with the purchasers that Rs. 10,000 shall remain with the purchasers as security for the annuity to Sonamoni Dasee, and that the other annuitant has been paid off by a sum of Rs. 708 in full satisfaction of her claim against the property.

Here the recitals terminate and the indenture goes on to witness that the vendors have sold the property to the purchasers for Rs. 35,000, of which Rs. 10,000 are to be retained by them as security as aforesaid. The vendors grant, sell, and convey the property to the purchasers in ordinary form together with "all the estate right, title, interest, claim, and demand whatsoever of the vendors unto and upon the said messuage, land, hereditaments, and premises and every part thereof, and also all deeds, papers, and writings solely relating to the said premises or any part thereof now in the custody of the vendors or which they can procure without suit."

Then follows a covenant in the following words :—

"The vendors do for themselves and himself, their and his heirs and representatives do, and each of them doth hereby covenant with the purchasers, their heirs, representatives, and assigns in manner following, that is to say, that the vendors at the time of sealing and delivery of these presents are lawfully, rightfully and absolutely possessed of and in the said messuage, land, and hereditaments hereinbefore granted and conveyed as an estate equivalent to fee simple in possession, free from encumbrances, and that the vendors now have in themselves full power and absolute right, title, and authority by these presents to grant and convey the said messuage, land, hereditaments, and premises unto, and to the use and behoof of the purchasers, their heirs, representatives and assigns from time to time."

Finally, there is a covenant to indemnify the purchasers against any loss at the suit of the annuitant, Sonamoni Dasee, or the three sisters (of whom the respondent is one), which may be incurred by them

by or by reason of the defect, if any, in the title of the vendors to the property.

The appellants paid the purchase money and took possession of the property under the conveyance, and remained in possession until the 22nd June 1897, when the respondent brought the present suit, claiming that she was entitled to one-half share in the said house, because as she and her sister Kanak Manjuri Dasee were unmarried daughters they were entitled to share equally her property, inasmuch as it was *stridhan*. She claimed that she was not bound by the said sale.

The respondent's claim to a moiety of her mother's *stridhan* is admitted to be good in law, so that the only question in the suit is whether the conveyance was valid. It is plain that at the date of this conveyance the property was still in the hands of the sole surviving executor, Hemendra Nath Bysack, and therefore he was competent as executor to sell it to the appellants, who were *bonâ fide* purchasers for value. But the respondent contends that although Hemendra Nath Bysack was in a position validly to convey it to the appellants as such executor, and did purport to convey it, he did not effectively do so, because the deed shows that he intended only to convey as a beneficial owner of the property, being under the impression that he and his two brothers, the co-vendors, were beneficially entitled to it as heirs to their mother, and being ignorant or forgetful of the right of the sisters to inherit in preference to them. It is on this ground alone that the High Court decided in favour of the respondent, reversing the decision of the Judge of the Court below, who had held that Hemendra Nath Bysack had by the deed conveyed all the right and title he possessed in every capacity, including that of sole surviving executor of the will of Prem Chand Bysack.

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Their Lordships are of opinion that the judgment of the Judge of first instance was right and ought to have been affirmed by the Court of Appeal. In the first place the deed itself gives abundant evidence that the position of Hemendra Nath Bysack as sole surviving executor was viewed as material by the parties to the conveyance, inasmuch as there are careful recitals as to the original appointment of executors and as to the death of his co-executors. His position as sole surviving executor could have no bearing on the conveyance if it were not that it affected, or might affect, his title to convey. But even in the absence of such direct evidence that the conveyance was by him in his capacity as executor as well as beneficial owner (if and to the extent that he was such owner), the deed makes it clear that all the vendors convey all the title and right that they possessed in the property, and that would undoubtedly include the right and title which one of them possessed as executor. That this would be the ordinary rule is admitted by the Judges of the Court of Appeal, who base their judgment on what they consider to be indications in the deed and in the conduct of the parties that the intention was that only the beneficial interest possessed by the vendors should be conveyed. Their Lordships are of opinion that this would be to contradict the deed itself; and, moreover, they are of opinion that the matters referred to would not support the conclusion drawn therefrom by the Judges of the High Court even if it was permissible to permit such considerations to affect the interpretation of the deed.

If the deed be considered from the point of view of the appellants who were the purchasers and who were not otherwise concerned with the property or its history, the transaction, as well as the deed which carries it out, become perfectly clear and intelligible.

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The property was by the will charged with two annuities, and in order that the executor might procure the funds necessary to pay the costs of past litigation the property was under mortgage. This mortgage was being called in and the sale was to enable the mortgage money to be raised. The purchasers naturally desired a clear title free from entanglements. They therefore required that the mortgage should be paid off and the annuitants settled with or security given against their claims. For both these purposes it was necessary that Hemendra Nath Bysack as executor should be a party to the deed, because the original mortgage was effected by him for the purpose of securing the costs for which he was of course liable, and on his discharging the indebtedness as to costs he would become entitled to claim for the same as against the estate including the house in question. Moreover, it is abundantly clear from the executor's accounts and from all the facts appearing in the record that the house still formed part of the undivided estate and that therefore he would be liable to pay the annuitants the amount of their annuities from time to time, as he had been doing for years past. The purchasers would not be likely to trouble themselves as to the question of whether or not the property would ultimately go to the sons or daughters, but would take care that all the persons in whom title could in any wise exist should join in the conveyance, and that they should be guaranteed against claims from those who did not do so. This is what the deed shows to have been done, and it would be entirely contrary to settled principles of law as well as most unjust to *bonâ fide* purchasers if the Courts were to allow its plain legal interpretation to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some

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or all of the parties to the conveyance at the date of its execution. The deed states plainly that whatever right or title the vendors possess is to go to support the conveyance, and it is a settled rule that the meaning of a deed is to be decided by the language used interpreted in its natural sense. From this wholesome rule their Lordships see no reason for departing in the present case.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed and that the judgment of the Court of Appeal should be set aside, with costs, and the judgment of the Judge of first instance restored. The respondents will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: *Barrow, Rogers & Nevill.*

Solicitors for the respondent: *Burton, Yeates & Hart.*

J. V. W.

APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

INTU MEAH MISTRY

v.

DARBUKSH BHUIYAN.*

1914

May 15.

Summons—Service of summons—Indian Marine Service—Civil Procedure Code (Act V of 1908) O. V, rr. 15, 17 and 27—Ex parte decree—Officer or mechanic in the employ of the Indian Marine.

Under the Civil Procedure Code an officer or mechanic in the employ of the Indian Marine is subject to exactly the same rules as any other person as regards service of summons. They come within the operation of rules 15 and 17 of Order V. of the Code of Civil Procedure.

APPEAL by Intu Meah Mistry, the petitioner.

This appeal arises out of the order of the Subordinate Judge of Chittagong rejecting the appellant's application to set aside an *ex parte* decree passed on the 28th of July 1909.

It appears that this litigation began in 1907 and that a decree was passed on the 14th of March 1908 in favour of 5 persons among whom the appellant was defendant No. 2. But upon appeal the Subordinate Judge reversed the Munsif's decision and found against the defendants. The defendant No. 1 who is proved to be joint with the defendant No. 2, preferred an appeal to the High Court and that appeal was summarily dismissed. During the pendency of the appeal in the High Court, defendant No. 2, the present appellant, applied to the Subordinate Judge to have his appeal re-heard by him. The Subordinate

* Appeal from Original order, No. 49 of 1912, against the order of J. M. Sarkar, Subordinate Judge of Chittagong, dated Dec. 16, 1911.

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Judge held that he had no jurisdiction to entertain the application. On appeal to this Court a Divisional Bench held that the Subordinate Judge had jurisdiction to decide the matter and he, accordingly on the 16th of December 1911 decided against the application made by defendant No. 2.

In his application the defendant No. 2 stated that he was employed as driver in H. M. S. *Rob Roy* and that he was all along away at Rangoon and that he had no knowledge of the institution of any appeal.

Aggrieved by the order of the Subordinate Judge defendant No. 2 appealed to this Court.

Babu Bepin Behari Ghose (with him *Babu Probodh Kumar Dass* and *Babu Khitish Chandra Chakravarti*), for the appellant, submitted that the appellant having admittedly been at Rangoon, no notice of the appeal in question was served upon him. The serving officer did not exercise the due and reasonable care required of him. Referred to O. V., rr. 11 and 17 of the Code of Civil Procedure: *Sakharam Bhaskar* v. *Padamkar Mahadeo* (1).

[HOLMWOOD J. What is the special procedure for service of summons upon a person belonging to the Indian Marine Service?]

There is no provision in the Code regarding the service of summons upon members of the Indian Marine Service. The serving officer did not make any enquiries from the members of the appellant's family as to where he was then residing.

His address could easily have been ascertained and notice duly served upon him.

Babu Surendra Nath Guha, for the respondent, submitted that the present application for rehearing was not a *bonâ fide* one. The defendant No. 1, who

(1) (1906) I. L. R. 30 Bom. 623.

appeared and contested the appeal, was joint with defendant No. 2. He set up a false story that he was separate from his brother. At the time of the service of notice appellant's wife, brother and nephew were residing at the ancestral house. Referred to O. V, r. 15 of the Code of Civil Procedure. According to r. 15 the service was a good service. There was no special provision for service of notice upon officers of the Indian Marine, and, therefore, rule 15 applied.

Regarding the meaning of the word residence, see *Kumud Nath Roy Chowdhury* v. *Jotindra Nath Chowdhury* (1). The defendant No. 2 was in correspondence with defendent No. 1 and his wife, and it would be impossible to believe that he had no notice of the appeal.

Babu Bepin Behari Ghose, in reply.

HOLMWOOD AND CHAPMAN JJ. This is an appeal from the order of the Subordinate Judge of Chittagong rejecting the appellant's application to set aside an *ex parte* decree of the 28th July 1909.

It appears that this litigation began in 1907 and that a decree was passed on the 14th March 1908 by the Munsif in favour of 5 persons among whom the appellant was the defendant No. 2. But upon appeal the learned Subordinate Judge in the Court below reversed the Munsif's decision and found against the five defendants. The defendant No. 1, who is proved to be joint with the defendant No. 2, preferred an appeal to the High Court and that appeal was summarily dismissed. The defendant No. 2, the present appellant, applied to the learned Subordinate Judge during the pendency of the appeal in the High Court to have his appeal re-heard by the Subordinate Judge.

(1) (1911) I. L. R. 38 Calc. 394.

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The Subordinate Judge held that he had no jurisdiction to entertain the application. On appeal to this Court a Divisional Bench of this Court held that he had jurisdiction to decide the matter and he was the best person to decide it. He has accordingly on the 16th of December 1911 decided against the defendant No. 2's application. The grounds which he has given appear on the face of them to be good, for it would appear from what he states not only that the provisions of the law contained in Order V, rules 15 and 17, were complied with, but that the learned Judge satisfied himself that the defendant No. 2 had an opportunity of appearing, inasmuch as he was in communication with his wife, brother and nephew during his absence at Rangoon both before and after the service.

One new factor has arisen in the case, namely that in his application in this case he states that he is employed as a *mistry* or engine-hand on H. M. S. "Rob Roy," and it may therefore be that he belongs to the Indian Marine Service. It is a curious fact that by rule 27 of Order V, officers belonging to his Majesty's Military or Naval forces or his Majesty's Indian Marine Service are excluded from the discretion which is given to the Court of serving notice on public officers or servants of a Railway Company or local authority through the head of their office if that course is most convenient. There is a further rule (rule 28) that where the defendant is a soldier, the Court shall send summons for service to his Commanding Officer. In this state of the law the only conclusion we can come to is that the officer or mechanic in the employ of the Indian Marine is subject to exactly the same rules as every other person under the Code, and we cannot therefore go beyond the provisions of rules 15 and 17 in this case.

It is urged that there was no proper enquiry, and if the peon had made the least enquiry from the other members he must have learnt that defendant No. 2 had gone back to Rangoon to join his employment. This might have some substance if defendant No. 2 had succeeded in establishing what he sought to establish viz., that he had separated from his brother, defendant No. 1, and from the other defendants after the Munsif's decision and that he had adverse interest to his brother, defendant No. 1. But in this he appears to have put forward a false story, and the Subordinate Judge in the lower Court has clearly found that his story is false. That being so, there is no other alternative but to accept the theory that defendant No. 1 did accept service on behalf of his brother although he refused to sign the notice. That notice was duly posted up, as is found, upon the office-room door of the place where the family ordinarily resided, and at the time living in that house were the wife, the brother and nephew of the defendant No. 2, and all these persons had correspondence with the defendant No. 2 during the time that the negotiations for the prosecution of the appeal were going on. It is therefore impossible for us to hold that the defendant No. 2 had not in fact notice of this appeal, and his continuous attempts to have this case re-opened, which has been going on for many years and when he is exactly in the same boat with his brother defendant No. 1, do not appear to be *bonâ fide*. For these reasons, the appeal is dismissed with costs,

S. K. B. *Appeal dismissed.*

PRIVY COUNCIL.

P.C.*
1914

April 24, 27;
May 18.

RAGHUNATH DAS
v.
SUNDAR DAS KHETRI.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Insolvency—Attachment under mortgage decree and order for sale of mortgaged property—Vesting order under s. 7 of Insolvency Act (11 & 12 Vict., c. 21), effect of—Sale after vesting order—Sale by Official Assignee to plaintiff—Title of purchaser from Official Assignee as against judgment-creditor purchasing at sale in execution of his own decree—Notice.

An attachment in execution of a money-decree on a mortgage of land, followed by an order for sale of the interest of the judgment-debtor does not create any charge on the land.

Sarkies v. *Bundhoo Buee* (1) referred to.

An attachment prevents and avoids any private alienation, but does not invalidate an alienation by operation of law such as is effected by a vesting order under the Indian Insolvency Act (11 & 12 Vict., c. 21); and an order for sale though it finds the parties does not confer title.

Previous to the 8th September 1904 a colliery leased to the judgment-debtors was attached under a mortgage decree by the respondents (judgment-creditors), and an order for sale on 5th September was made, but at the request of the judgment-debtors the sale was postponed until the 10th. On 8th September the judgment-debtors filed their petition in the Insolvency Court in Calcutta and the usual vesting order was made on the same day. On 12th September the execution proceedings were stayed. After issue of notice, on the application of the respondents, to the Official Assignee to show cause why he should not be substituted in the place of the judgment-debtors, the Subordinate Judge on 10th January 1905, finding that the notice had been duly served, made the order for substitution and fixed the sale for 6th March 1905, on which day the property was sold, and purchased

* *Present*: LORD MOULTON, LORD PARKER, SIR JOHN EDGE AND MR. AMEER ALI.

(1) (1866) 1 N.-W. P. 172.

by the respondents who in June were put into possession. Meanwhile on 23rd May 1905 the Official Assignee with leave from the Insolvency Court in March 1908 sold the property to a purchaser, who on 24th June 1908 sold it to the plaintiffs by whom on 16th July 1908 the present suit was brought for possession of the colliery.

Held (reversing the decision of the High Court), that the notice calling on the Official Assignee to show cause why he should not be substituted for the judgment-debtors was not a proper notice under section 248 of the Civil Procedure Code, 1882. A notice under that section should have called on him to show cause why the decree should not be executed against him. But assuming the notice to have been duly served (which was denied) the sale was altogether irregular and inoperative The property having vested in the Official Assignee it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land, and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place, no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which had been done. In the third place, the judgment-debtors had, at the time of the sale, no right, title or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property.

Malkarjun v. *Narhari* (1) distinguished.

No proper notice was served under section 248 of the Civil Procedure Code, and the respondents had full notice, and were responsible for the irregularities of the procedure adopted.

APPEAL 98 of 1913 from a judgment and decree (4th June 1912) of the High Court at Calcutta, which reversed a judgment and decree (8th September 1909) of the Court of the Subordinate Judge of Burdwan.

The plaintiffs were the appellants to His Majesty in Council.

The main question for determination in this appeal was as to whether the title to certain lease-hold interests in a colliery, together with its equipment, engines, boilers, offices, etc., is in the appellants who were purchasers from the Official Assignee of Bengal, or in the respondents (defendants) who were

(1) (1900) I. L. R. 25 Bom. 337 ; L. R. 27 I. A. 216.

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purchasers in execution of a decree. The Subordinate Judge gave a decree for the plaintiffs.

The judgment appealed from (CHITTY and TEUNON JJ.), where the facts of the case are sufficiently stated, was as follows :—

"On 1st December 1899, the defendants granted a pottah of coal lands to Atul Nath Chatterji and Rajendra Nath Chatterji at an annual jama of Rs. 3,626-11-10 and a salami of Rs. 4,001. The lessees were two of four brothers, the others being Aghore Nath Chatterji and Chandra Nath Chatterji. The four brothers, who were members of a joint family, became heavily indebted to several creditors. On 6th December 1903, the present defendants filed a suit against their lessees for rent under the pottah and, on 23rd June 1904, obtained a decree against them for Rs. 3,090-10-6 and costs Rs. 350-7 annas. The other two brothers were also parties to that suit as *pro forma* defendants. On 13th July 1904, the defendants applied for execution of their decree by attachment of the immovable properties belonging to the judgment-debtors The lease-hold property was accordingly attached and 5th September 1904 was fixed for the sale. On that day, the judgment-debtors Nos. 1 and 2 applied for time to enable them to raise money by sale of the attached property, and the sale was accordingly adjourned until 10th September. On the 8th September, all four brothers filed their petition in the Court for the Relief of Insolvent Debtors at Calcutta and, on the same day the Court made the usual vesting order under section 7 of the Indian Insolvent Act. On 30th September 1904, the defendants applied to the Subordinate Judge of Burdwan to substitute the Official Assignee in the place of the judgment-debtors in the execution proceedings under their decree. On 23rd November, notice was ordered to issue to the Official Assignee to show cause why he should not be substituted in the place of the judgment-debtors, and it was made returnable on 22nd December 1904. On 10th January 1905 the Subordinate Judge, finding that Mr. Miller had been duly served with the notice, ordered that he be substituted in the place of the judgment-debtors, and 6th March 1905 was fixed for the sale of the attached property. On that day the property was sold and purchased by the defendants, the decree-holders. On 18th April 1905, the sale was confirmed and on the 14th June 1905, an order was made for delivery of possession to the defendants as purchasers and they accordingly took possession under it. Meanwhile, on the 23rd May 1905, the Official Assignee applied to the Insolvency Court and obtained an order that he should be at liberty to sell either by public auction or private contract to the best purchaser the properties of the insolvents including the lease-hold premises in question. He did not, as a matter of fact, sell at

that time ; but, on the 24th March, 1908, he sold the premises now in question to Hormusji Pestonji Banker *alias* Billimoria, a Parsi gentleman of Asansole. On the 24th June 1908, three months later, Banker sold the property to the present plaintiffs. On 16th July 1908, this suit was instituted to recover possession of the property.

"The learned Subordinate Judge has decreed the plaintiffs' suit and the defendants have appealed

"The first question is one of fact—whether the notice for substitution was duly served on the Official Assignee in the execution case. The Judge says that it is shown to have been served on a clerk of the Official Assignee and, in the absence of evidence to show that this amounted to service on the Official Assignee or that the clerk had authority to receive it, he finds that it was not properly served. This finding appears to us to be entirely against the evidence on the record. The clerk of the Official Assignee, Lakhinarayan Dhar, states that he has been an Assistant in the Official Assignee's office for 29 years. He admits that the notice was served in that office and that he signed acknowledging the receipt. He states that he received the notice on behalf of the Official Assignee, and made over the copy to Mr. Langer, the Head Assistant. The Small Cause Court bailiff (who has been a bailiff for 30 years and who served the notice) says that he has known Lakhinarayan Babu as the head-clerk or Bara Babu for 20 years and that he served notices for the Official Assignee upon him 20 or 30 times. He states that he always served notices for Mr. A. B. Miller on Lakhinarayan Dhar in this manner. There can be no question on this evidence that the notice was served in the Official Assignee's office in the usual way, and, in the absence of any evidence to the contrary, we must presume that Lakhinarayan Dhar was a person authorised to receive such notices within the meaning of section 75 of the Code of the Civil Procedure of 1882. It would have been simple for the opposite party to have called evidence from the Official Assignee's office to disprove this, had it been incorrect. We therefore hold that the notice for the substitution was duly served on the Official Assignee.

"The next question is what was the effect of the sale in execution as against the Official Assignee. It was argued for the defendants (i) that the Official Assignee was bound by the execution proceedings and by the sale which took place as we have stated ; (ii) that the lease-hold interest did not vest in the Official Assignee because he did not take possession ; and (iii) that the decree being one for rent, the decree holders were entitled to sell the lease-hold interest of the insolvents and to give a good title.

"(i). With regard to the first question, it must be conceded that the order for substituting the Official Assignee in place of the judgment-debtors in the execution proceedings was incorrect : see the case of *Miller* v.

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Budhsingh Dudhuria (1). But the Official Assignee having been added and having taken no exception to the procedure, the sale must be regarded as having taken place in his presence and as binding upon him. The fact that a person who was not the representative of the judgment-debtors was brought upon the record as such representative, would not affect the validity of the sale: see *Malkarjun* v. *Narhari* (2). The Official Assignee having taken no steps to have that sale set aside in the manner provided by law, the sale must be taken to be good as against him.

"(ii). We cannot accept the second contention raised by the learned pleader for the defendants that the property had not vested in the Official Assignee. It is true that, in cases of lease-hold property, the Official Assignee has the right to elect whether or not he will accept the property under the vesting order. If he does so, there is no question that his acceptance relates back to the date of the vesting order: see *Abdul Razak* v. *Kerman* (3) That was the converse case and the question there was whether the Official Assignee could be made liable for the rent of the lease-hold property. It was held that inasmuch as he had taken possession, he must be regarded as having elected to take over the property. Here, he paid no rent, nor did he take actual possession; but the property did vest in him by the vesting order, and, that he regarded it as having vested in him is made plain by the application which he made to the Insolvency Court, on the 23rd May 1905, for leave to sell the property. He could not sell it unless it were vested in him. That being so, we must hold that the sale was effective as against the Official Assignee and also against the plaintiffs who claim through him. The plaintiffs are, in fact, in a dilemma. If the property had not then vested in the Official Assignee, it was sold away before the Official Assignee acquired any title to it; if it had vested in him—and we think that it had—it was sold in his presence and the sale was binding on him."

The High Court held that it was unnecessary to decide the 3rd point, and the appeal was allowed and the suit dismissed with costs.

On this appeal,

De Gruyther K. C. and *A. M. Dunne*, for the appellants, contended that they had established a good title

(1) (1890) I. L. R. 18 Calc. 43.
(2) (1900) I. L. R. 25 Bom. 337; L. R. 27 I. A. 216.
(3) (1898) I. L. R. 22 Bom. 617.

to the property in suit. The proceedings in execution subsequent to the insolvency of the judgment-debtors, and the sale of 6th March 1905 were without jurisdiction, *ultra vires*, and invalid, and passed no title to the respondents. The Insolvency Act (11 & 12 Vict., c. 21) section 7 under which the vesting order was made, was referred to. In India an attachment of property and an order to sell it did not affect the title of the Official Assignee. Was it different where he had been made a party? It was submitted not. A judgment-creditor had no priority over the Official Assignee in respect of property attached by him prior to the vesting order: *Peacock* v. *Madan Gopal*(1). The proper proceedings to make the Official Assignee a party were not taken. He was served with a notice to show cause why he should not be substituted for the judgment-debtors in the suit. The procedure for substituting one person for another on the record was contained in chapter XXI, sections 370, 372 of the Civil Procedure Code 1882; that section (372) applied where the substituted party represented the other, but there was no provision for making the Official Assignee a defendant in place of the judgment-debtors whom he did not represent: see *Miller* v. *Budh Singh Dhudhuria* (2). The Official Assignee represented rather the interests of the creditors, for the benefit of whom the insolvent's estate was vested in him. Those sections were not applicable in execution of decree: *Goodall* v. *Mussoorie Bank* (3). The substitution of the Official Assignee would have no effect on the sale; what was ordered to be sold was the right, title and interest of the judgment-debtors, and that was not altered by the substitution; the purchaser took nothing as after the making of the vesting order the

(1) (1902) I. L. R. 29 Calc. 428. (2) (1890) I. L. R. 18 Calc. 43.
(3) (1887) I. L. R. 10 All. 97.

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judgment-debtors had no interest that could be sold. The position of the Official Assignee was shown by the case of *In re Hunt Monnet & Co: Ex parte Gamble* v. *Bholagir Mangir*(1); and section 49 of the Insolvency Act was referred to. He could apply for stay of execution and the word "may" in that section meant "shall." A notice might have been served on him under section 248 of the Code of Civil Procedure to show cause why the decree should not be executed, but he received no notice except for the substitution of his name in place of the judgment-debtors which was wrong. *Jitmand Ramanand* v. *Ramchand Nandram*(2) and *Kristnaswamy Mudaliar* v. *Official Assignee of Madras* (3) which both followed the case of *Peacock* v. *Madan Gopal*(4); and also Civil Procedure Code, 1882, sections 284, 287, 291 and 316 were referred to. The proclamation of sale only referred to the right, title and interest of the judgment-debtors; there was no power in the Court to make a fresh order for sale of the Official Assignee's interest, and even if there was power to do it such an order was not made.

B. Dubé, for the respondents, contended that the appellants had tried to make out an entirely new case. The notice of the execution proceedings, the evidence showed, was duly served on the Official Assignee under sections 75, 91 and 92 of the Civil Procedure Code; and the sale took place in his presence: he represented the judgment-debtors under section 244 of the Civil Procedure Code. It was settled law that where a person has been made a party to execution proceedings his only remedy in such a case as this was under section 244; that was a suit to set aside the sale under section 311, but that had to be done within a year

(1) (1864) 1 Bom. H. C. 251.
(2) (1905) I. L. R. 29 Bom. 405.
(3) (1903) I. L. R. 26 Mad. 673.
(4) (1902) I. L. R. 29 Calc. 428.

after the sale. As to the notice to the Official Assignee even if it were wrongly served, such an irregularity was a matter which could be dealt with in execution of decree under section 244 of the Code. Reference was made to *Malkarjun* v. *Narhari*(1), *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*(2) and *Punchanun Bundopadhya* v. *Rabia Bibi*(3). It must be presumed that the notice was duly served. As to notice under section 248 of the Civil Procedure Code, reference was made to *Bimola Sundaree Dassee* v. *Kalee Kishen Mojoomdar* (4). It was now too late to set aside the sale. An application to do so was barred by limitation under Article 12 of Schedule II of the Limitation Act, 1877.

De Gruyther K. C. replied.

The judgment of their Lordships was delivered by

May 18

LORD PARKER. The action in which this appeal arises is an action for the recovery of a leasehold colliery. The plaintiffs (the present appellants) claimed title to the property under the Official Assignee in the insolvency of the lessees. The order vesting the property in such Official Assignee was made under the Insolvent Debtors (India) Act, 1848, on the 8th September 1904. At the date of this order, the colliery had been attached in execution case No. 303 of 1904, in which the lessees were the judgment-debtors and the defendants (the present respondents) were the judgment-creditors, and an order had been obtained for the sale of the interest therein of the judgment-debtors. Counsel for the respondents admitted that attachment in execution of

(1) (1900) I.L.R. 25 Bom. 337, 346: L. R. 27 I. A. 216, 224.
(2) (1892) I. L.R. 19 Calc. 683: L. R. 19 I.A. 166.
(3) (1890) I.L.R. 17 Calc. 711.
(4) (1874) 22 W. R. 6.

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a money-decree followed by such an order for sale does not confer on the judgment creditor any charge on the land: see *Sarkies* v. *Bandho Baee* (1). An attachment prevents and avoids any private alienation, but does not invalidate an alienation by operation of law such as is effected by a vesting order under the Act of 1848, and an order for sale, though it binds the parties, does not confer title.

It follows that under the order of the 8th September 1904, the property vested in the Official Assignee free from any charge in favour of the judgment-creditors. The Official Assignee in due course, by order of the Court having jurisdiction in the insolvency, sold the property, and the appellants derive title through the purchaser. Their title is thus *primâ facie* a good and valid title, but it is disputed by the respondents under the following circumstances.

On the 12th September 1904, the Judge in the execution proceedings stayed the sale therein directed until further order. This was the proper and indeed the only thing he could do, for the judgment-debtors had no longer any interest which could be sold. Further, if, as was no doubt the case, the judgment debt was included in the schedule filed by the insolvents under the Act, their Lordships are of opinion that he was bound to stay the sale under section 49 of the Act. At any rate the execution could not proceed until the Official Assignee had been properly brought before the Court, and an order binding on him had been obtained. In their Lordships' opinion this could only be done by obtaining an order for the issue of, and by serving him with, a notice under section 248 of the Civil Code of 1882, which was the Code then in force. It was suggested

(1) (1866) 1 N.-W. P. 172.

in argument that he might have been made a party to the proceedings either under section 32 or under section 372 of the Code, but even if these sections are applicable after final decree, as to which there is considerable doubt [see *Goodall* v. *Mussoorie Bank*, (1)], no proceedings seem to have been taken thereunder. What the judgment-creditors did was this: they applied to the Judge in the execution case for an order, and on the 30th September 1904, and again on the 3rd November, obtained an order for the issue and service on the Official Assignee of a notice calling upon him to show cause why he should not be substituted in the suit for the judgment-debtors. This was not a proper notice under the 248th section. A notice under that section should have called upon the Official Assignee to show cause why the decree should not be executed against him. Had the Official Assignee been served with such a notice, it is at least probable that he would, as in their Lordships' opinion he certainly could, have shewn good cause why the decree should not be executed, the property having under the Act and vesting order been transferred to him for the benefit of the creditors of the insolvent generally. It is possible that the notice might be upheld as a proper notice preliminary to adding the Official Assignee as a party under the 32nd section, if that section were applicable, but in order to bind a party added under the 32nd section, he has, after being added, to be served with a summons to appear and answer, and it is not suggested that any such summons was served. Similarly, it is not suggested that any order to carry on proceedings was obtained under the 372nd section.

Having obtained leave in that behalf, the respondents proceeded to serve the notice in question, and

(1) (1887) I. L. R. 10 All. 97.

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their Lordships will assume that the notice was duly served on the Official Assignee. The Official Assignee took no notice of it, possibly because he had no objection to being substituted as a party, and expected to be served with notice of any further application against him. There is no evidence that he knew that an order for sale had been already made. The time fixed by the notice for cause to be shown having expired, the respondents, without further notice to the Official Assignee, applied for and obtained an order not only substituting the Official Assignee as a party in the place of the judgment-debtors but directing the sale to proceed. The sale accordingly proceeded. There had to be a fresh sale proclamation by reason of the 291st section of the Code. Such proclamation is not in evidence, but their Lordships must presume in default of evidence to the contrary that the property offered for sale was the property ordered to be sold, that is to say, the right and interest of the judgment-debtors in the colliery. At the sale the respondents (the judgment-creditors) having obtained leave to bid, became the purchasers. The sale was confirmed by the Court on the 8th April 1905, and on the 25th April 1905 the appellants obtained the usual certificate which refers to the right, title, and interest of the judgment-debtors as the property sold. Their Lordships are of opinion that this sale was altogether irregular and inoperative. In the first place the property having passed to the Official Assignee it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land, and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he

was not bound by anything which was done. In the third place the judgment-debtors had at the time of the sale no right, title, or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property.

Their Lordships' attention was called in this connection to the case of *Malkarjun* v. *Narhari* (1), but in their opinion there is nothing in that case which has any bearing upon the present appeal. As laid down in *Gopal Chunder Chatterje* v. *Gunamoni Dasi* (2), a notice under section 248 of the Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor. In the case of *Malkarjun* v. *Narhari*(1), such a notice had been served, and the Court had determined, as it had power to do for the purpose of the execution proceedings, that the party served with the notice was in fact the legal representative. It had therefore jurisdiction to sell, though the decision as to who was the legal representative was erroneous. There being jurisdiction to sell, and the purchasers having no notice of any irregularity, the sale held good unless or until it were set aside by appropriate proceedings for the purpose. The present case is of a wholly different character. No proper notice was served under the section, and the respondents had full notice of, and indeed were responsible for, the irregularities of the procedure adopted.

The respondents suggested that with regard to certain machinery, which was included in the sale of the colliery by the Official Assignee, and which was also sought to be recovered in this action, the statute of limitations was a good defence. This point

(1) (1900) I. L. R. 25 Bom. 337 ; L. R. 27 I. A. 216. (2) (1892) I. L. R. 20 Calc. 370.

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does not appear to have been taken at any time prior to the hearing before their Lordships' Board. It was not one of the issues settled by the Court on the action, nor did the respondents mention it among their grounds of appeal from the decision of the Subordinate Judge. Their Lordships consider that it involves an inquiry as to the nature of the machinery to which it is said to be applicable, and that it is therefore too late to raise it.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed and the decree of the High Court of the 4th June 1912 set aside with costs, here and below, and that the judgment of the Subordinate Judge of Burdwan of the 8th September 1909 ought to be restored.

Appeal allowed.

Solicitors for the appellants: *W. W. Box & Co.*

Solicitors for the respondents: *Barrow, Rogers & Nevill.*

J. V. W.

APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C.J., and Stephen J.

1914

May 2

MADRAS STEAM NAVIGATION CO., LD.

v.

SHALIMAR WORKS, LD.*

Arrest of Ship—Trespass—Absence of Notice—Cause of action—Admiralty jurisdiction—Letters Patent, 1865, cl. 32—Letters Patent, 1862, cl. 31—Charter of the Supreme Court, 1774, cl. 26—Admiralty Court Act, 1840 (3 & 4 Vict. c. 65)—Admiralty Court Act, 1861. (24 Vict. c. 10) s. 5—Colonial Courts of Admiralty Act, 1890, (53 & 54 Vict. c. 27) s. 2 (3) (a), s. 35—Interpretation Act, 1889 (52 & 53 Vict. c. 63) s. 18 (2)—Maritime necessaries—Action in rem—Wrongful seizure—Limitation Act (IX of 1908) Sch. I, Arts. 29, 36,49—Pleading.

On the 4th June 1910, the respondent company instituted a suit *in rem* against the *Clan Mackintosh* in this Court as a Colonial Court of Admiralty for an amount alleged to be due to them for maritime necessaries, and obtained a warrant of arrest. The ship was arrested on the same day, and remained under arrest until her release on the 31st January 1912, the action having been dismissed two days earlier on the ground of absence of jurisdiction. The owners of the ship were the appellant company, who had their office in Burma. On the 14th June 1912, the appellant company instituted the present suit in the ordinary original civil jurisdiction of this Court against the respondent company for the wrongful arrest of the ship. The suit as framed was based on malice or its equivalent, but at the hearing the appellant company proceeded on the footing of the suit being one for mere trespass.

Held, that in the absence of proof of malice or its equivalent, a suit for simple trespass will not lie for the arrest of a ship.

The Walter D. Wallet (1), *Xenos* v. *Aldersley*. *The Evangelismos* (2) and *The Strathnaver* (3) referred to.

* Appeal from Original Civil, No. 70 of 1913, in suit No. 567 of 1912.

(1) [1893] P. 202. (2) (1858) 12 Moo. P.C. 352.

(3) (1875) L. R. 1 A. C. 58, 67.

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The arrestment of the ship was a judicial act of the Court, and an ordinary step in an action *in rem*. Under the arrest, the custody and possession was with the Marshal as an officer of the Court and could not be regarded as a detention by the respondent company. The damage, if any, suffered from the continuance of the officer's custody, and possession was due not to the default of the respondent company but to the law's delay.

Peruvian Guano Co. v. *Dreyfus* (1) followed.

The foundation of the Admiralty jurisdiction of the High Court, more especially in respect of maritime necessaries discussed.

The "Two Ellens" (2), *The Henrich Bjorn* (3), *Murray* v. *Longford* (4), *The Asia* (5), *The Portugal* (6), *Bardot* v. *The Augusta* (7) referred to.

Assuming that the High Court in its Admiralty jurisdiction did not acquire jurisdiction over maritime necessaries by any previous enactment, such jurisdiction would now rest on the Colonial Courts of Admiralty Act, 1890 which vests in it the powers described in section 5 of the Admiralty Act, 1861. To oust the jurisdiction of this Court under section 5, it is not enough that the owners of the ship should be in fact domiciled in India or Burma ; this domicile has to be proved to the satisfaction of the Court.

Ex parte Michael (8) followed.

Inasmuch as such proof was not produced before the Court, when the order for arrest was made, the order for arrest cannot be treated as *coram non judice* or a nullity.

Assuming that an action would lie in the absence of proof of malice or its equivalent, the action would be for wrongful seizure under legal process and would be barred by Art. 29 of the Limitation Act.

It is imperative under Order VII, rule 1 (*e*) of the Code of Civil Procedure that a plaint should contain "the facts constituting the cause of action and *when it arose*.

APPEAL by the plaintiff company, the Madras Steam Navigation Company, Ld., against the judgment of Fletcher J.

This appeal arose out of a suit instituted in the ordinary original civil jurisdiction of this Court by the owners of a steamship for damages for the

(1) [1892] A. C. 166.
(2) (1872) L. R. 4 P. C. 161.
(3) (1886) L. R. 11 A. C. 270.
(4) (1842) 1 Fulton 95, 97, 131.
(5) (1868) 5 Bom. H. C. (O. C.) 64.
(6) (1870) 6 B. L. R. 323.
(7) (1873) 10 Bom. H. C. 110.
(8) (1872) L. R. 7 Q. B. 658, 660.

wrongful arrest of the vessel in an action *in rem* instituted in this Court, as a Colonial Court of Admiralty.

The appellant company was a company incorporated under the provisions of the Indian Companies Act having its registered office in Rangoon, in Burma, and owned amongst other vessels the *S. S. Clan Mackintosh*. By an agreement made in Calcuttta on the 4th February 1910 between the appellant company and the Shalimar Works, Ld., which was incorporated under the Indian Companies Act and had its registered office in Calcutta, the latter agreed to carry out certain repairs, additions and alterations to and in respect of the *Clan Mackintosh* at certain rates and on certain terms.

On the 4th June 1910 the Shalimar Works, Ld., instituted a suit *in rem* against the vessel in this Court, as a Colonial Court of Admiralty intituled "In the matter of the steamship or vessel the *Clan Mackintosh*, her tackle apparel and furniture" for the sum of Rs. 89,187-12 alleged to be due to them for maritime necessaries. In the affidavit in support of the action, sworn by one William Francis Bremner, an assistant in the firm of the agents for the promovents, the following statement appeared :—

"By an agreement in writing made at Calcutta on the 4th February 1910 between the Madras Steam Navigation Company, Ld., joint stock company with limited liability duly registered under the Indian Companies Act and having its head office in Rangoon the owners of the said steamship or vessel *Clan Mackintosh* and the promovents, the promovents agreed to carry out certain repairs, additions and alterations in the schedule thereto mentioned at the rates and upon the terms therein specified." On the 4th June 1910 a warrant of arrest was issued by

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Fletcher J., in the following form :—

"Arrest the steamship or vessel called the *Clan Mackintosh* now lying in the river Hooghly in the port of Calcutta whereof D. P. Malcolm is Master, her tackle apparel and furniture wheresoever same shall be found and cite all persons in general who shall have or pretend to have any right, title or interest therein to appear on the sixth day after arrest to answer to the Shalimar Works, Ld., in a cause of maritime necessaries supplied to the said ship.

Action for Rs. 89,187-12.

Bail for Rs. 92,000."

On the same date the Marshal of Calcutta arrested the *Clan Mackintosh* while lying in the river Hooghly in the port of Calcutta.

The action came on for hearing on the 29th January 1912, before Chitty J., who dismissed the action with costs on the ground that the Court had no jurisdiction. On the 31st January 1912, the *Clan Mackintosh* was released from arrest.

On the 4th June 1912, the present suit was instituted by the Madras Steam Navigation Company, Ld. The plaint was as follows :—

1. That the plain iff company has been at all times material to this suit and is now the owner of the steamship or vessel called the *Clan Mackintosh* and of the said vessel's tackle, apparel and furniture.

2. That on the 4th day of June 1910 while the said vessel was lying in the river Hooghly in the port of Calcutta and in the possession of the plaintiff company the defendant company (which carries on business at No. 6, Lyon's Range in Calcutta aforesaid) filed an action book in this Hon'ble Court sitting as a Colonial Court of Admiralty in the matter of the said vessel the *Clan Mackintosh* her tackle, apparel and furniture, falsely alleging therein that a sum of Rs. 89,187-12 was due to the defendant company for maritime necessaries supplied to the said vessel, and maliciously and without reasonable or probable cause, procured a warrant of arrest from the said Court and thereupon, and in pursuance of the said order, the defendant company caused to be sued out of the said Court and in the said action the said warrant of arrest directed to the Marshal of Calcutta and caused the said vessel, her tackle, apparel and future to be wrongfully arrested and detained from the said 4th day of June 1910 until the time hereinafter mentioned and further caused the said Marshal

of Calcutta to write and address the following letter to the Port Officer of Calcutta :—

From A. J. PUGH, ESQ.,
Marshal of Calcutta,
To The Port Officer, Calcutta.

Dated the 4th June 1910.

SIR,

I have arrested the steamship *Clan Mackintosh* (whereof D. P. Malcolm now is or lately was Master) under a warrant issued by this Court as a Colonial Court of Admiralty.

Will you therefore be so good as not to allow the said steamship to proceed to sea until she is released in due course of law.

I have, etc.
A. J. PUGH,
Marshal.

3. That the said action came on for hearing on the 29th of January 1912 before the said Court sitting as a Colonial Court of Admiralty as aforesaid when the said action was dismissed on the ground that the said Court had no jurisdiction to try the said action, and that thereafter and on the 31st day of January the said vessel was released from arrest.

4. That the plaintiff company is advised and believes, and it submits, that the said warrant of arrest was issued without jurisdiction as aforesaid and was absolutely void and inoperative and of no effect in law and that by reason of the wrongful and malicious arrest and detention of the said vessel as aforesaid, the plaintiff company has been deprived of the use and of the possession of the said vessel from the said 4th day of June 1910 till the said 31st day of January 1912 and has suffered damages to the extent of Rs. 5,85,630-6-9 particulars whereof are given in the schedule here annexed and marked with the letter "A" and the plaintiff company craves leave to refer to the same as well as to the said action book which is now filed of the said Court as part of this its plaint.

Then followed the prayer for judgment for the sum of Rs. 5,85,630-6-9 and costs.

In their written statement the Shalimar Works, Ld., denied malice and want of reasonable or probable cause in procuring the warrant of arrest or causing the vessel to be wrongly arrested and detained, and stated that in the proceedings mentioned the defendants acted in good faith and had reasonable and probable cause for such proceeding, and that the acts

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complained of were judicial acts of the Court. The defendant company stated that if the warrant of arrest was void, inoperative and of no effect in law which was not admitted the plaintiff company should have applied to discharge the same and have the vessel released. The defendant company denied that the arrest and detention was either wrongful or malicious, or that the plaintiff company in consequence thereof had suffered any damage.

At the hearing the plaintiff company made no attempt to establish the charges of malice and want of reasonable and probable cause against the defendant company, and the suit proceeded as one of trespass.

On the 23rd May 1913, Fletcher J., dismissed the suit, observing:—

"This is a suit brought by the Madras Steam Navigation Co., Ld. registered under the Indian Companies Act having its registered office at 1, Barr Street, in Rangoon, against the Shalimar Works, Ld., whose registered office is at 6, Lyons Range, Calcutta. The case of the plaintiffs is this that they were and are the owners of a Steamship called "Clan Mackintosh", that on the 4th of June 1910 when the ship was within the Port of Calcutta in the possession of the plaintiff Company the defendants caused the ship "Clan Mackintosh" to be arrested by this Court in exercise of its Admiralty Jurisdiction in a suit in which the present defendants were the plaintiffs. The action was an action *in rem* against the ship to recover Rs. 81,187-12 for necessaries supplied to the ship. The plaintiffs allege that the arrest was made at the instance of the defendants maliciously and without reasonable or probable cause. The ship remained in the custody of the Marshal of this Court until it was released on the 29th January 1910, when apparently the suit was dismissed by Mr. Justice Chitty on the ground that the Court had no jurisdiction to try this suit. The plaintiffs, therefore claim for the wrongful arrest of the ship Rs. 5,85,630-6-9 as damages. The case has been opened by Mr. Mitter and he has put his case in two ways. First of all he says that the action is an action of trespass, and it is not necessary for him to prove malice or want of reasonable or probable cause on the part of the defendants in having the ship arrested. Secondly, he says that the action if he was in a position to prove malice or want of reasonable or probable cause would be an action on the case. It seems to me that contention of Mr. Mitter is sound and if he is

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able to prove in this case that the ship was arrested at the instance of the defendants and that the act of the Court was a ministerial act made at the instance of the present defendants wholly without jurisdiction, then it would not be necessary for the plaintiffs to prove that the defendants had been guilty of malice in causing the ship to be arrested. So far as the present plaintiffs have not given any evidence of proof of malice, therefore the action must be treated as if it was an action of trespass against the defendants to recover damages for having caused the plaintiff's vessel to be arrested by an act of the Court. The jurisdiction of this Court to exercise Admiralty jurisdiction in cases for necessaries supplied apparently is governed by two statutes. One is the Court of Admiralty Act of 1861, and the other one is the Colonial Court of Admiralty Act, 1890. These are two principal statutes that govern the jurisdiction of this Court. But in order to arrive at the jurisdiction you have got to go back and find out what was the jurisdiction of the Court of Admiralty in England. The Court of Admiralty had no jurisdiction over cases for necessaries supplied to the ship at home and that was the position of matters when the Act of 1861 was passed. By the 5th section of the Act of 1861 the Court of Admiralty was given jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the Port to which the ship belongs, that is the enacting part of the section, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales. However, that section of the statute is not without judicial decision. I find the case of *Ex parte Michael* (1). That was the decision of Cockburn C. J. and Mr. Justice (afterwards Lord) Blackburn. That case came on before the Court on a motion for a rule for a prohibition against the County Court of Gloucestershire holden at Bristol and the way the matter came before the Court was as follows :—The County Courts for the maritime counties in England have a limited admiralty jurisdiction for necessaries supplied to a ship within the limits of their own jurisdiction and it appeared in that case that a bark called the "Lothior" being in the port of Bristol was ordered to be arrested by the order of the County Court Judge for a sum alleged to be due for necessaries and the case subsequently came on before the County Court and the County Court Judge condemned the ship for the amount claimed for necessaries. It afterwards appeared that when the suit was tried the owner of the bark was domiciled in England. The owner accordingly made an application to the Court of Queen's Bench for a writ of prohibition to prohibit the County Court Judge at Bristol from proceeding further with the matter. The learned Judges pointed out that the Court

(1) (1872) L. R. 7 Q. B. 658.

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had jurisdiction to decide the matter unless it was shewn prior to the final judgment that the owner of the ship was domiciled in England and afterwards it was too late. In this case this Court has got that jurisdiction extended to it under the provisions of the Colonial Court of Admiralty Act 1890 and the second section of that statute enacts that every Court of Law in a British possession which is for the time being declared in pursuance of this Act to be a Court of Admiralty in its original unlimited civil jurisdiction shall be a Court of Admiralty and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of all its other civil jurisdiction. The second sub-section enacts that the jurisdiction of a Colonial Court of Admiralty subject to the provisions of this Act be over the like places, persons, matters and things, as the admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England and shall have the same regard as that Court to international law and comity of nations. Then the third sub-section provides certain provisoes to make the provision in the Imperial statute with reference to England and Wales apply to the different British possessions and the proviso (*a*) in the 3rd sub-section enacts that any enactment in an Act of the Imperial Parliament referring to the Admiralty Jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales. It is said that this Court has no jurisdiction although the owner resides in any other part of British India, to arrest the ship. I am not prepared to say that is so. It is not easy to read the provision of this statute if you are to read the British possession as being whole of British India and various different High Courts. However, it is unnecessary in this case in my opinion to determine that point. Now, what is the cause of action that the plaintiffs have to rely on? It is said that the Court when it arrested the ship at the instance of the present defendants was performing a ministerial act and the act must be deemed as the wrongful act of the defendant, because it cannot be doubted that if the act was a judicial act of the Court, then assuming the act to be without jurisdiction, the plaintiffs cannot recover in this suit unless they can prove that the defendants were guilty of malice; as I have already said, the case of malice has been dropped on the ground that the plaintiffs can not give evidence to shew that the defendant Company was guilty of malice in causing the ship to be arrested. So one has to consider the case purely on that footing of action for trespass Mr. Mitter has referred to *Clissold* v. *Cratchley* (1) and all the other cases

(1) [1910] 2 K. B. 244.

that he has referred to are cases of execution, and cases of execution in England except in cases of execution against the body of judgment-debtors under the amended law of 1869 are none of them judicial acts. The executions in England are carried on by the Sheriffs in different counties and all the cases of execution are ministerial All those cases that Mr. Mitter has cited turn on the case of execution. Mr. Mitter has suggested that the case of *Parson* v. *Lord* (1) did not. But it did, because the process that was used was *capias ad respondendum*, and it turned out that the writ directed to the Sheriff was not legal. That case is totally different. In this case under section 5 of the Admiralty Act 1861 and the provisions of Colonial Courts of Admiralty Act 1890 the Court directed the Marshal to arrest and hold the steamship of the plaintiff pending the disposal of the suit brought by the present defendants, unless and until security was given for the amount sued for. That is obviously a matter which the Court was capable of deciding and it was capable of deciding whether the writ ought to go or where it appeared that the owner or part-owner was domiciled in the British possession over which this Court as a Colonial Court of Admiralty had jurisdiction. I am not convinced with Mr. Mitter's argument that the Court did not properly exercise its jurisdiction. It may be it appears on the face of the record that the Madras Steam Navigation Company is domiciled in British Burma. I am not sure that it does. But assuming for the purpose of the present argument that the Madras Steamship Company is domiciled in Burma and under the provisions of the Colonial Courts of Admiralty Act 1890, read along with the Statute of 1861 that this Court had no jurisdiction to arrest a ship, because the owner of the vessel was domiciled in British Burma, it seems to me that all you can say is that the Court made a mistake in directing the vessel to be arrested. It is quite clear that is a quite different case from the cases of execution that are given in the books in England. In a case of this nature the plaintiff has to prove malice before he can maintain his suit assuming that the Court had no jurisdiction to arrest the vessel then the order of arrest was the act of the Court for which the defendants are not liable, unless it can be shewn that they were guilty of malice or they acted without reasonable or probable cause. The present plaintiffs have not produced any evidence on either of these points. The present suit, therefore, fails and must be dismissed with costs on Scale No. 2."

From this judgment the plaintiff company appealed.

Mr. B. C. Mitter (with him *Mr. H. C. Mazumdar*), for the appellant company. Chitty J.'s judgment and

(1) (1772) 3 Wilson 341.

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decree of the 29th January 1912 has never been appealed against, and the parties are bound by that judgment, namely, that the Court had no jurisdiction to issue the warrant of arrest—the consequence is that the warrant of arrest was void and inoperative and the arrest was wrongful. Where there has been attachment of a party's property at the instance of another, and the Court had no jurisdiction to make the order of attachment, the former party is entitled to damages without proof of malice or want of reasonable or probable cause: *Bishun Singh* v. *Wyatt* (1) and *Bhut Nath* v. *Chandra Benode* (2), in both cases *Clissold* v. *Cratchley* (3) being cited. The suit should have been decreed.

Mr. S. P. Sinha (with him *Mr. Cubitt*), for the respondent company. The case made in the plaint of malicious arrest has been abandoned and the suit has been prosecuted as one based on trespass. Assuming the seizure was wrongful and a suit for trespass would lie, it is submitted the suit was barred by limitation. The ship was arrested on the 4th June 1910 and the cause of action arose on that date. Under Art. 29 of the Limitation Act (which is the article which is applicable and not the general provision Art. 36) the period of limitation was one year from that date, and inasmuch as the present suit was instituted on the 4th June 1912, it was timebarred. The detention of the ship till the 31st January 1912 did not extend the period of limitation. The wrong, if any, was complete when the seizure was made: continued attachment cannot be said to be a continuing cause of action: trespass may under certain circumstances be a continuing wrong, but not where there has been ouster; under those circumstances the wrong

(1) (1911) 16 C. W. N. 540. (2) (1912) 16 C. L. J. 34.
(3) [1910] 2 K. B. 244.

was at the initial stage: there is no fresh cause of action from day to day: *Hughes* v. *Chairman of the Municipal Commissioners of Howrah* (1), *Violett* v. *Sympson* (2), *Multan Chand Kanyalal* v. *Bank of Madras* (3), *Ram Narain* v. *Umrao Singh* (4), *Raiah of Venkatagiri* v. *Isakapalli Subbiah* (5), *Dhanjibhoy Bomanji* v. *Hirabai* (6). See also Halsbury's Laws of England, Vol. XIX, p. 695, Mitra's Law of Limitation, pp. 232, 273.

[JENKINS C.J. referred to *Pamu Sanyasi* v. *Zamindar of Jayapur* (7).]

The cause of action must depend on the relief claimed. If the relief sought is the return of the article seized and detained, that would be a cause of action governed by Arts. 48 and 49. If the relief sought is a claim for damages, Art. 29 would apply.

If the warrant of arrest was issued without jurisdiction and was void *ab initio*, it was open to the plaintiff Company immediately to apply to the Admiratly Court for the release of the ship. That was the plaintiff Company's proper course: Halsbury's Laws of England Vol. I, p. 88., Vol. XIX, p. 698: *The Evangelismos* (8). It is submitted this suit was misconceived and no action for trespass was sustainable. The warrant for arrest was lawfully issued and the arrest of the ship was lawfully effected. It is contended by the appellant company that the warrant of arrest, and the arrest itself were bad in law and inoperative inasmuch as under section 5 of the Admiralty Courts Act 1861, Fletcher J. had no jurisdiction to entertain the suit in which the order was made. This argument is based on the circumstance that the head office of the appellant company was in Rangoon. It

(1) (1873) 19 W R. 339.
(2) (1857) 8 E. & B. 344.
(3) (1903) I. L. R. 27 Mad. 346
(4) (1907) I. L. R. 29 All. 615
(5) (1902) I. L. R. 26 Mad. 411.
(6) (1901) I. L. R 25 Bom. 644.
(7) (1901) I. L. R. 25 Mad. 540.
(8) (1858) 12 Moo. P. C. 352.

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is true that under the Interpretation Act 1889, India and Burma constitute one "British Possession", and by virtue of the Colonial Courts of Admiralty Act 1890, section 2 (*3*), clause (*a*), which extends the Admiralty Court Act 1861 to British Possessions, the expression "England and Wales" in section 5 of the latter Act is to be replaced by the name of the British Possession, in this case "India and Burma" But did the terms of section 5 deprive this Court, as a Colonial Court of Admiralty, of jurisdiction in the circumstances of this case? The Court clearly had jurisdiction over the subject-matter of the claim, namely price of maritime necessaries—and it is admitted the necessaries were supplied at a port other than that to which the ship belonged. The question arises as to the construction to be placed on the expression "unless it is shown to the satisfaction of the Court that at the time of the institution of the case any owner or part-owner of the ship is domiciled in India or Burma." It is true the domicile of the owners must be taken to be in Burma. But it is submitted that the proper construction to be placed on the clause in the circumstances of this case is, the Court *prima facie* had jurisdiction to entertain the action, but this jurisdiction is liable to be ousted if it is proved to the satisfaction of the Court before judgment, that the owners are domiciled in Burma; see *Ex parte Michael* (1). No such proof was placed before Fletcher J. The appellants will rely on the passage in Bremner's affidavit "having its head office in Rangoon," but that is no proof. This is not a case where there was an entire absence of jurisdiction which might make an order void. It is submitted that if a judge of a superior Court erroneously assumes jurisdiction, the matter cannot be said to be

(1) (1872) L. R. 7 Q. B. 658, 660.

non coram judice The authorities cited for the appellants are cases where there was no interposition of a judicial act. It is only in respect of writs, which were issued without judicial action, that it has been held that where the writ was bad in law, an action would lie for false imprisonment or other civil process: *Parsons* v. *Loyd* (1), *Barker* v. *Braham* (2), *Bates* v. *Pilling* (3). But where a judge, although erroneously, makes an order for arrest or attachment, no cause of action would arise: *Daniells* v. *Fielding* (4). In *Bishun Singh* v. *Wyatt* (5) and *Bhut Nath* v. *Chandra Binode* (6), Mookerjee J. failed to notice the distinction which exists between cases where an arrest follows on a judicial order, and cases where an arresst is effected by a ministerial officer without such judicial order—the latter alone founds a cause of action.

Mr. Mitter, in reply. I do not rest my case on the doctrine of continuing wrong. Article 29 of the Limitation Act does not apply to the circumstances of this case. Assuming the argument to be sound that the Court had no jurisdiction to issue the warrant of arrest, it was not a case of "wrongful seizure." On the face of the writ, the seizure was justified. Art. 29 applies only to cases where the writ is wrongly executed, as where the goods of a third party are seized: *Multan Chand Kanyalal* v. *Bank of Madras* (7), *Manavikraman* v. *Avisilan Koya* (8), *Ram Narain* v. *Umrao Singh* (9). If Art. 29 does not apply, it is immaterial whether the case is governed by Art. 36 or Art. 49.

(1) (1772) 3 Wils. 341.
(2) (1773) 3 Wils 368.
(3) (1826) 6 B. & C. 38.
(4) (1846) 16 M. & W. 200.
(5) (1911) 16 C. W. N. 540.
(6) (1912) 16 C. L. J. 34.
(7) (1903) I. L. R. 27 Mad. 346.
(8) (1895) I. L. R. 19 Mad. 80.
(9) (1907) I. L. R. 29 All. 615.

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This case is covered by the ruling in *Clissold* v. *Cratchley* (1). At page 249 Vaughan William's L. J. says: "In Bullen and Leake's Precedents, 3rd edition at page 353, I find this statement: 'an action will not lie for an arrest on final process upon a subsisting unsatisfied judgment.....but if the party arrested can get the judgment set aside for irregularity or on any other ground, or can shew that the judgment was satisfied by payment or otherwise before the arrest, he may then maintain an action: the arrest in such case would in general support an action of trespass' In the present case execution ensued in pursuance of a judgment which was subsequently set aside—it follows an action will lie for trespass.

[JENKINS C.J. referred to *The Walter D. Wallet* (2).]

The action book filed by the respondent company in the Admiralty Court showed on the face of it, that the Court had no jurisdiction: the owners of the ship are described as having their head office that is to say their domicile in Rangoon. Hence the writ was wrongly obtained. Whether a suit for malicious prosecution lay or not, it is submitted the action for trespass would lie.

[JENKINS C. J. What do you say to the theory that it is by arrest of the ship, the Admiralty Court gave itself jurisdiction?]

The arrest was effected at the instance of the party, and as the Court had no jurisdiction, the arrest was the act of the party. A distinction must be made between erroneous process and irregular process; the former is void *ab initio*, the latter good till set aside: *Parsons* v. *Loyd* (3). See also Clerk and Lindsell on Torts, 14th edition, page 661.

(1) [1910] 2 K. B. 244. (2) [1893] P. 202

(3) (1772) 3 Wills. 341.

[JENKINS C.J. I would have rejected your plaint on the ground that it does not state when the cause of action arose.]

It is never done on the Original Side.

[JENKINS C. J. I hope from this day onward it will be done. You must state when your cause of action arises. Moreover, you do not state in the body of your plaint, why it was the Court in Admiralty had no jurisdiction.]

Cur. adv. vult.

JENKINS C. J. On the 4th June 1910, a company called the Shalimar Works, Limited, instituted a suit *in rem* against the vessel, *Clan Macintosh*, for an amount alleged to be due to them for that which is described in the plaint in this suit and has throughout been treated as maritime necessaries.

On the same day the vessel was arrested, and she thenceforth remained under arrest until her release on the 31st January 1912, the suit *in rem* having been dismissed two days earlier.

On the 4th June 1912, the present suit was instituted on the ordinary original side of this Court claiming damages for the wrongful arrest.

In the plaint it is alleged that the plaintiff company is the owner of the ship, that the defendant company instituted the suit *in rem* "falsely alleging therein that a sum of Rs. 89,187-12 was due to the defendant company for maritime necessaries supplied to the said vessel and maliciously and without reasonable or probable cause procured a warrant of arrest from the said Court" and that "therefore in pursuance of the said order the defendant company caused to be sued out of the said Court and in the said action the said warrant of arrest directed to the Marshal of Calcutta and caused the said vessel, her tackle, apparel

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and furniture to be wrongfully arrested and detained from the said 4th day of June 1910 until the time hereinafter mentioned" (para 2).

The plaintiff company then alleges the dismissal of the suit *in rem* for want of jurisdiction (para. 3) and submits "that the said warrant of arrest was issued without jurisdiction . . . and was absolutely void and inoperative and of no effect in law and that by reason of wrongful and malicious arrest and detention of the said vessel . . the plaintiff company has been deprived of the use and of the possession of the said vessel from the said 4th day of June 1910 till the said 31st day of January 1912 and has suffered damages to the extent of Rs. 5,85,630-6-9" (para. 4).

In form the suit is essentially one for the malicious abuse of the process of the Court [*see* Bullen and Leake's Precedents. 3rd Edition. pp. 353—356 and *Redway* v. *Mc. Andrew* (1).] But no attempt was made at the trial to prove malice, and before us this aspect of the case has been deliberately abandoned from the outset, for no mention or even suggestion has been made of malice, or the absence of reasonable and probable cause, or *crassa negligentia* or bad faith.

The only case made before us was trespass pure and simple; I will, therefore, limit myself to that.

It may be a question whether a plaint, framed as this is, fairly supports a claim based on trespass, more especially as the plaint is defective in an important particular. [*See* the declaration in *Redway* v. *Mc. Andrew* (1) to which there was a general demurrer]. It is imperative under Order VII, rule 1 (*e*), that the plaint should contain, in addition to other particulars, "the facts constituting the cause of action and when it arose." There is no specific allegation in the plaint when the cause of action arose; and yet if the plaint is

(1) (1873) L. R. 9 Q. B. 74.

to be treated as permitting an alternative claim on the ground of trespass, there would be a different date according as it was treated as a suit for malicious prosecution or a suit for trespass.

But apart from that, I am not at present prepared to hold that an ordinary suit for trespass lies for the arrest of a ship. There is no trace of any such suit in the books, and yet the occasion for it must have frequently arisen.

The only reference to such a suit that I have been able to find is in *The Walter* v. *D. Wallet*(1), where an action was brought for an alleged trespass on a vessel and for its wronghful arrest. Sir Francis Jeune in disposing of the case said that the claim for trespass clearly could not be maintained. The reason of this decision, however, does not appear, and it may be it has no application in the circumstances of this case.

The arrestment of the ship is a judicial act of the Court and an ordinary step in an action *in rem*, so, where it constitutes a legal grievance, it is not an independent wrong, but an integral part of an action *in rem* in which there was malice, or its equivalent, entitling the aggrieved person to seek compensation either in the Admiralty proceedings or by separate action.

In the case of *Xenos* v. *Aldersley*, *The Evangelismos*(2) a ship was arrested, and in *The Strathnaver* (3) the result of that case was summed up as follows; "Their Lordships came to the conclusion, though the case was certainly a very strong one, inasmuch as the wrong vessel had been siezed, that in the absence of proof of *mala fides* and malicious negligence, they ought not to give damages against the parties arresting the ship."

(1) [1893] P. 202. (2) (1858) 12 Moo. P.C. 352.
(3) (1875) L.R. 1 A. C. 58, 67.

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The principle enunciated in *Peruvian Guano Co.* v. *Dreyfus Brothers & Co.*(1) may fairly be cited in this connection. One of the questions there considered was whether the wrongful possession of the defendant continued after the appointment of a Receiver so as to give a claim for damages. It was held it did not, and Lord Watson in the course of his judgment said: "The order of the 17th December 1880 for the appointment of a receiver had the immediate effect of making the company bare custodiers for the Court; and the appointment of the 23rd of February 1881 transferred the actual possession of the cargoes or their proceeds from the company to an officer of Court. In my opinion, detention by the company, whether it had been legal or illegal, ceased at the first of these dates. That circumstance would not affect the quantum of damages due by the company, if it could be shewn that the law regards loss arising to the party ultimately successful from the possession of the Court as stake-holders, as loss directly and naturally resulting from the previous wrongful acts of his adversary. I know of no principle, and of no authority, for that proposition. It appears to me that from the time when the order of the 17th of December 1880 was made, the company and Dreyfus Brothers stood towards each other in the same position in which they would have been placed if the eleven cargoes had never come into the possession of the company, and had been thrown into Court by the captains of the carrying vessels. When possession of the subject of controversy is with the Court, the competing parties are simply preferring their claims in the ordinary course of law; and any damages which the successful party may suffer from the continuance of litigation

(1) [1892] A. C. 166, 187, 195.

are due to the law's delay, and not to any legal wrong perpetrated by his unsuccessful competitor."

Lord Macnaghten too remarked—"But it appears to me that the detention of these cargoes by the company came to an end when the order was made for the appointment of a receiver. From the date of that order possession was taken out of the hands of the company. Thenceforth the possession was the possession of the Court. I do not think that the possession of the Court can be regarded as detention by the company, nor do I think that any loss or diminution of profit, which may be attributable to the circumstance that the property in quesion in the action was placed in the custody of the Court, is the direct or natural result of the detention by the company."

Here too it may fairly be said that under the arrest the custody and possession was with the Marshal as an officer of the Court, and cannot be regarded as a detention by the defendant company. The damage, if any, suffered from the continuance of the officer's custody and possession was due not to default of the defendant company, but to the law's delay.

The English decisions must be our guide in dealing with maritime matters here, and therefore I feel justified in citing them.

This Court's general Admiralty Jurisdiction rests on clause 32 of the Letters Patent of 1865, which continues clause 31 of the Letters Patent of 1862; and the effect of these clauses is to vest in the High Court such civil and maritime jurisdiction as might be exercised by the Supreme Court as a Court of Admiralty, or by any Judge of that Court as Commissary of the Vice-Admiralty Court.

The Admiralty Jurisdiction of the Supreme Court is defined as follows in the Charter of 1774, clause 26: "And it is Our further will and pleasure, and We do

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hereby grant, ordain, establish and appoint that the said Supreme Court of Judicature at Fort William in Bengal, shall be Court of Admiralty, in and for the said provinces, countries or districts, of Bengal, Bihar and Orissa and all other territories and islands adjacent thereunto, and which now are or ought to be dependent thereupon; and We do hereby commit and grant to the said Supreme Court of Judicature at Fort William in Bengal, full power and authority to take cognizance of, hear, examine, try and determine all causes civil and maritime, and all pleas of contracts, debts, exchanges, policies of assurance accounts, charter-parties agreements, loading of ships and all matters and contracts, which in any manner whatsoever relate to freight or money due for ships hired and let out, transport-money, maritime usury or bottomry, or to extortions, trespasses, injuries complaints, demands and matters civil and maritime, whatsoever, between merchants, owners and proprietors of ships and vessels employed or used within the jurisdiction aforesaid, or between others, contracted, done, had or commenced, in upon, or by the sea or public rivers, or ports, creeks harbours and places overflown within the ebbing and flowing of the sea and high water mark, within, about and throughout the said three provinces, countries or districts of Bengal, Bihar and Orissa and all the said territories or islands adjacent thereunto and dependent thereupon, the cognizance whereof doth belong to the jurisdiction of the Admiralty, as the same is used and exercised in that part of Great Britain called England, together with all and singular their incidents, emergents, and dependencies annexed and connexed causes whatsoever, and to proceed summarily therein, with all possible despatch according to the course of our Admiralty of that part of Great Britain called

England without the strict formalities of law considering only the truth of the fact and the equity of the case."

It was ultimately settled to be the law in England that previous to the passing of 3 and 4 Vict 65, the Court of Admiralty had no jurisdiction in the case of necessaries supplied to a ship, though perhaps it occasionally purported to exercise the jurisdiction where not prohibited: *The Two Ellens* (1), *The Henrich Bjorn* (2).

The same view has obtained in India [*Murray* v. *Langford* (3), *The Asia* (4)]; but there is a difference of opinion as to whether the extended powers under 3 and 4 Vict., c. 65 and 24 Vict., c. 10 became vested in Indian High Court by virtue of the several Letters Patent: *The Portugal* (5), *The Asia* (4), *Bardot* v. *The Augusta* (6).

For the purposes of this case I will assume they did not. If this be the true view, then this Court's jurisdiction in relation to necessaries rests on the Colonial Courts of Admiralty Act, 1890, which vests in it (among other things) the powers described in section 5 of 24 Vict., c. 10. That section provides that the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship Court belongs unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales. Under section 35 the jurisdiction conferred by the Act may be exercised either by proceedings *in rem* or by proceedings *in personam*.

(1) (1872) L. R. 4 P. C. 161.
(2) (1886) L. R. 11 A. C. 270.
(3) (1842) 1 Fulton 95, 97, 131.
(4) (1868) 5 Bom. H. C. (O. C.) 64.
(5) (1870) 6 B. L. R. 323.
(6) (1873) 10 Bom. H. C. 110.

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By the Colonial Courts of Admiralty Act, 1890, s. 2(3)(a), it is provided that any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales. By the Interpretation Act 1889, s. 18(2), it is provided that the expression "British possession" shall mean any part of Her Majesty's dominions exclusive of the United Kingdom, and where parts of such dominions are under both a central and local Legislature, all parts under the central Legislature shall for the purposes of this definition be deemed to be one British possession.

British India and Burma thus take the place of England and Wales for the purposes of this case.

It is conceded that when the suit *in rem* against the *Clan Macintosh* was instituted, the ship was elsewhere than in the port to which the ship belonged.

To that extent then the suit was in order.

It is, however, contended that the owner was domiciled in Burma, and that the suit was thus beyond the jurisdiction of this Court. But to take away jurisdiction it is not enough that the owner was so domiciled; this domicile had to be shewn to the satisfaction of the Court. Blackburn J. dealing with section 5 of 24 Vict., Cap. 10 in *Ex parte Michael* (1) said,—"That seems clearly enough to enact that the Admiralty Court shall have jurisdiction when the necessaries are supplied in England just as if they had been supplied abroad; but then it is added, unless it be shewn to the Court that the owner be domiciled in England; but *that must be alleged and proved* to the satisfaction of the Court before judgment; and it is too late afterwards."

(1) (1872) L. R. 7 Q. B. 658, 660.

In the same case Cockburn C. J. thus described the position: "It is conceded that the County Court had jurisdiction over the subject-matter of the suit and the only ground on which the Court could be called upon *to proceed no further* is the exception in the section which gives the jurisdiction, that it be shewn to the satisfaction of the Court, that is, the Court in which the suit is pending, that the defendant is domiciled in England or Wales."

When the arrest in this case was made it had not been shewn to the Court that the owner was domiciled in Burma at the time of the institution of the suit; it was, to use the language of Blackburn J., neither alleged nor proved, and so that exception which would have made it imperative on the Court to proceed no further had not been established at that stage.

No doubt the plaintiff company contends that by paragraph 1, T. W. F. Bremner's affidavit, the owner's domicile was shown to the satisfaction of the Court; but the fact is that it was not so shown, and the statement in that paragraph is taken from the agreement and is not an independent allegation of the state of affairs at the institution of the suit. And here I may point out that the rule, which prescribes what the affidavit leading to a warrant of arrest should state, does not require any statement of the owner's domicile. Had the present plaintiff company so desired, it could have made such a statement and have procured the release of the ship at any time. It, however, did nothing of the kind, and counsel for the present plaintiff company has admitted before us, that even in its written statement in that suit it did not specifically allege that its domicile was in Burma.

It is true that the suit *in rem* was dismissed, and the decree contains a recital of the Court's opinion

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that it had no jurisdiction. But on what materials this result was reached does not appear.

Assuming for the purpose of the case that a person aggrieved by the arrest of his ship is entitled to compensation even in the absence of proof of malice or its equivalent, it remains to be seen what would be the nature of his suit: it would be for a seizure under legal process.

But if the seizure was lawful, no suit would lie; if unlawful it would be governed by Article 29 of the Limitation Act, and that in the circumstances of the case would be a bar to this suit.

It has been argued that the seizure was not under legal process, for that as the suit was dismissed for want of jurisdiction, the order for arrest was *coram non judice*.

But the order for arrest was an usual step in a suit *in rem*, and at the time when it was made the Court had jurisdiction over the subject-matter and the exception had not been established. Therefore, the order of arrest cannot (in my opinion) be treated as *coram non judice* or a nullity.

It has been further contended that as this was a trespass to goods, Article 36 should be applied; but Article 29 is specific and fits the case, and it is a rule of construction of long application that a general Article does not govern where there is a particular Article which covers the case.

Nor do I think can Art. 49 be treated as governing this case rather than Art. 29. It was the seizure, if wrongful, that was the cause of action and the plaintiff cannot treat the suit as one for trespass apart from the seizure for the purpose of evading Art. 29.

The conclusion then to which I come is, that this suit as framed is based on malice or its equivalent;

that in the absence of proof of malice or its equivalent the suit if treated as one for trespass will not lie in the circumstances of this case: and that if such a suit did lie it would fall under Art. 29 and would be barred. I, therefore, would dismiss this appeal with costs.

STEPHEN J. I agree.

Appeal dismissed.

Attorney for the appellant company: *J. C. Dutt.*
Attorneys for the respondent company: *Pugh & Co.*

J. C.

INSOLVENCY JURISDICTION.

Before Chitty J.

In re J. M. LUCAS AND ANOTHER.*

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May 18.

Insolvency—Practice—Presidency Towns Insolvency Act (III of 1909), s. 36, (4), (5), whether applicable to contentious matters.

Section 36 (4) and (5) of the Presidency Towns Insolvency Act, 1909, is intended to provide a summary procedure for ordering payment of debts due, and delivery of property belonging to an insolvent, where there is no dispute; it is not intended for contentious matters or for following property the subject of fraudulent preference or dishonest concealment.

APPLICATION.

These were two applications on behalf of the Official Assignee under s. 36 of the Presidency Towns Insolvency Act, 1909. The first under s. 36 (5) prayed that Mrs. Amy Zemin, the mother-in-law of the insolvent J. M. Lucas, should be ordered to deliver over to the Official Assignee certain immoveable properties,

* Application in Insolvency Suit No. 50 of 1912.

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namely, Nos. 40, 41, 41-1, 41-2, and 42, Elliott Road, Calcutta, as being the property of the insolvent and now in her possession. These properties had been transferred to Mrs. Zemin by J. M. Lucas by a conveyance bearing date September 26, 1911. The consideration for the transfer was expressed to be a sum of Rs. 50,000.

On February 21, 1912, J. M. Lucas and his brother C. J. Lucas were adjudicated insolvents on their own petition. An order was made for Mrs. Zemin's examination under s. 36, and she was examined on March 8, 1913, and in the course of her examination she stated with regard to the consideration money that a sum of Rs. 30,000 had actually been paid by her to J. M. Lucas, and that to discharge the remaining Rs. 20,000 she had released two debts of 12,000 and Rs. 8,000 respectively, due from J. M. Lucas to her on account of loans advanced by her in 1904.

The second application was under s. 36 (*4*) of the Act for an order that one George Edmond Pereiro should pay to the Official Assignee four sums of Rs. 460, Rs. 901-12-9, Rs. 5,750 and Rs. 6,750, as money received by him from the insolvents by way of fraudulent preference and also a sum of Rs. 4,000 odd due from him to the insolvents in respect of other transactions. G. E. Pereiro was examined under section 36, but did not admit that these sums, or any of them were owing to the insolvents.

After the examination of Mrs. Zemin and of G. E. Pereiro, charges were framed in accordance with the provisions of s. 103 (*b*) of the Act against J. M. Lucas, one of such charges being in respect of the transfer of the Elliott Road properties to Mrs. Zemin and another being in respect of the alleged debt of Rs. 5,750 owing from G. E. Pereiro. On these charges J. M. Lucas was convicted and sentenced. He, thereupon preferred an appeal against his conviction, and this

appeal was pending at the time of these applications. Subsequently the appeal was allowed and the conviction quashed by Jenkins C. J. and Woodroffe J.

Mr. Avetoom and *Mr. A. N. Chaudhuri*, for the Official Assignee. It is the practice of the Court to make orders under this section when it is satisfied that any person is indebted to the insolvent's estate, or is in possession of property divisible among the creditors. The powers were exercised under the corresponding s. 26 (*1*) of the former Act (11 & 12 Vict. c. 12): *In re Dwarkanath Mitter* (1).

Mr. B. Chakravarti and *Mr. B. K. Lahiri*, for Mrs. Zemin, and *Mr. Langford James*, for G. E. Pereiro. These applications are misconceived: section 36 was only intended to be employed in cases when possession of the insolvent's property is admitted. s. 36 (*4*) and (*5*) corresponds to s. 27 (*4*) and (*5*) of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and the language there is—"If any person on examination before the Court admits," etc. Where the title or indebtedness is disputed, the Official Assignee must either file a suit in the ordinary way or make a substantive application as contemplated by Rule 5 (*d*) of the Insolvency Rules of the High Court corresponding to Rule 6(*e*) of the Bankruptcy Rules, 1886.

Cur. adv. vult.

CHITTY J. This is an application presented under section 36 (*5*) of the Presidency Towns Insolvency Act, 1909, by the Official Assignee praying that Mrs. Amy Zemin, who was examined under that section in the matter of C. J. and J. M. Lucas, insolvents, should be ordered to deliver over to the Official Assignee certain immoveable property situate in

(1) (1869) 4 B. L. R. 63.

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Elliott Road, Calcutta, as being the property of the insolvent J. M. Lucas and now in her possession.

The insolvents were so adjudged on their own petition on February 21, 1912. Admittedly the property in question was conveyed to the witness, who is the mother-in-law of J. M. Lucas, by deed dated September 26, 1911, less than five months before the adjudication. The conveyance purports to have been made (subject to a mortgage and further charge of the Phœnix Assurance Co. Ld.), for a consideration of Rs. 50,000 paid by Mrs. Zemin to J. M. Lucas. The story of the witness, as disclosed on her examination, was that Rs. 30,000 was actually paid, the other Rs. 20,000 being a debt due to her by her son-in-law for two loans of Rs. 12,000 and Rs. 8,000 made by her to him in 1904.

Mrs. Zemin was examined on March 8, 1913. Subsequently J. M. Lucas was proceeded against under section 103 of the Act, one of the charges relating to this transfer. He was tried before me and found guilty. He has appealed, and the hearing of the appeal has been postponed until orders have been passed on this application. In my opinion, the two matters are in no way dependent one upon the other. An order under section 36 can only be made if on the examination of any person the Court is satisfied that he has in his possession any property belonging to the insolvent. A charge under section 103 may be substantiated by oral and documentary evidence and the notes of the examination of the insolvent may be used against him. In this particular case, Mrs. Zemin was not examined in the proceedings under section 103 either for or against the insolvent. This application must be decided on her statement and her statement alone. The criminal charge depended upon altogether separate evidence.

Section 36 is copied from section 27 of the Bankruptcy Act, 1883, with this difference. The English Act says :—"If any person on examination before the Court admits that he has in his possession any property belonging to the debtor, the Court may on the application of the Official Receiver or Trustee order him to deliver" etc. Here the words are :—"If on the examination of any such person the Court is satisfied that he has in his possession" etc. In my opinion, there is very little distinction to be drawn between, the two modes of expression. Under the Indian Act, it may not be necessary to have an express admission from the witness as it is in England, but the fact of possession must appear from his examination, which amounts to very much the same thing, because the Court can only proceed on the witness' statements and no evidence can be called to contradict them.

In this case it was argued that Mrs. Zemin's statements could not be accepted as true, that what she said was so improbable that no Court could believe her. I agree, but even assuming that she is not worthy of credit, it does not follow that the converse of what she has stated can be held to be proved *on her examination*, and that is what is necessary for an order under this section. It is not suggested that Mrs. Zemin has made any statement which could be construed into an admission or be taken as satisfactory proof that this was a bogus transaction. It may well have been that, and in the criminal proceedings on other evidence I have held that it was. It cannot, however, be said to be satisfactorily established on her examination.

I regret this result, but in my opinion the Official Assignee has adopted the wrong procedure. What he should have done was to make such an application as is provided for by rule 5 (*d*), on which evidence could

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CHITTY J.

have been taken for and against, and the question of title properly decided. In my opinion, section 36 (*4*) and (*5*) was intended to provide a summary procedure for ordering payment of debts due and delivery of property belonging to an insolvent when there was no dispute. It was never intended for contentious matters such as the present, or for following property the subject of fraudulent preference or dishonest concealment. It appears to me unnecessary to refer to section 26 of the Indian Insolvency Act, 1848, or to cases decided upon it. The procedure now introduced is not the same, and is manifestly taken from the English Act of 1883. The application must be refused, but in the view that I take of Mrs. Zemin's evidence I make no order in her favour for costs.

The application for an order under section 36 (*4*) against George Edmond Pereiro must fail for the same reasons. In this case it is asked that he be ordered to pay to the Official Assignee four sums Rs. 640, Rs. 901-12-9, Rs 5,750 and Rs. 6,750 aggregating Rs. 14,041-12-9 received by him from the insolvents and also Rs. 4,000 being the amount advanced to him by the insolvents for the purchase of their respective shares in their father's estate. I am of opinion that this application must fail for the reasons given above in Mrs. Zemin's matter. The first four sums are said to be payments made by way of fraudulent preference to Pereiro who is entered in the insolvents schedule as a creditor for Rs. 10,991-1. One of these sums Rs. 5,750 or the shellac representing it, has been made the subject of a charge in the criminal case, and J. M. Lucas has been convicted on that charge. It is true that Pereiro has mentioned these four sums, but there is nothing in his answers amounting to an admission or satisfactory proof that these sums or any of them belong to the insolvent. As regards the Rs. 901-12-9

he did say that if the Court ordered, he would pay it but that is all.

As I have said above, in my opinion the procedure laid down by section 36 is inappropriate in dealing with cases of fraudulent preference. I must not be regarded as accepting Pereiro's statements as correct. I have little doubt that they are false.

As to the Rs. 4,000, I do not think that the Official Assignee could claim this in any case. Subsequently to the examination, which closed in April 1913, *viz.*, on June 5, 1913, the Official Assignee has executed a conveyance in favour of Pereiro of the shares of the insolvents in their father's estate. He cannot now be allowed to say that the insolvents and not Pereiro were the purchasers.

This application also fails but, as in Mrs. Zemin's case, I make no order as to costs.

H. R. P. *Applications refused.*

Attorneys for the Official Assignee : *Gregory & Co.*

Attorneys for Mrs. Zemin & G. E. Pereiro: *R. M. Chatterjee.*

PRIVY COUNCIL.

P.C.*
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May 19.

MAHA PRASAD SINGH
v.
RAMANI MOHAN SINGH.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Jurisdiction—Suit to enforce mortgage of land partly in Sonthal Parganas, and partly in local jurisdiction of Bhagalpur Court—Jurisdiction of Bhagalpur Court—Sonthal Parganas Settlement Regulation (III of 1872), ss. 5 and 6—Sonthal Parganas Act (XXXVII of 1855), s. 2—Sonthal Parganas Justice Regulation (V of 1893), Part 2 and s. 10—Consent of parties to jurisdiction of a Court—Usury provision relating to in s. 6, Regulation III of 1872—Question of Jurisdiction not taken in High Court—Scheduled Districts Act (XIV of 1874).

In a suit, in the Court of the Subordinate Judge of Bhagalpur, to enforce a mortgage bond for principal and interest amounting to over 5 lakhs of rupees, by far the greater portion of the mortgaged property was situated in the Sonthal Parganas, and the mortgagors resided in that district the rest of the property being situated within the local jurisdiction of the Bhagalpur Court. The mortgage bond was executed at Bhagalpur, and contained a stipulation that the mortgagees might enforce it in the Bhagalpur Court. The suit was instituted on 20th June 1904. On an objection taken that the Bhagalpur Court had no jurisdiction to entertain the suit :—

Held, on an examination and consideration of the Acts and Regulations applicable to the Sonthal Parganas, that at the date the suit was commenced no suit would lie in any Court established under the Bengal Civil Courts Act (VI of 1871) or under the Bengal United Provinces, and Assam Civil Courts Act (XII of 1887) which has taken its place, in regard to any land, or any interest in, or arising out of land, but such suits must have been brought before Settlement Officers, or in Courts of Officers appointed under section 2 of the Sonthal Parganas Act (XXXVII of 1855), and the Sonthal Parganas Justice Regulation (V of 1893), Part 2, so long as the land had not been settled, and the settlement declared by a notification

* *Present*: LORD SHAW, LORD MOULTON, SIR JOHN EDGE AND MR AMEER ALI.

in the Calcutta Gazette to have been completed and concluded. And, it being found that the land included in the mortgage in suit had not been wholly settled, the suit came within the provisions of s. 5 of the Sonthal Parganas Settlement Regulation (III of 1872), and was excluded from the jurisdiction of any but the special officers or Courts appointed under s. 2 of Act XXXVII of 1855, and therefore the Bhagalpur Court not being one of the special Courts had no jurisdiction to try it.

The stipulation in the mortgage bond to the effect that the mortgagees might enforce it in the Bhagalpur Court was of no effect. As the suit was one with regard to land in the Sonthal Parganas which the Bhagalpur Court had no jurisdiction to entertain, the parties could not by consent give the necessary jurisdiction to the Court. To allow them to do so would be to nullify the express provisions of, s. 5 of Regulation III of 1872 which was binding on any Court having jurisdiction in the Sonthal Parganas in the exercise of such jurisdiction.

Held, also, that, apart from the question of jurisdiction, any Court dealing with the subject matter of the suit would be bound to give full force and effect to the provisions of s. 6 of Regulation III of 1872, relating to usury, and therefore to refuse to decree any compound interest arising from any intermediate adjustment of interest, or a total amount of interest exceeding the principal of the original debt or loan. This provision of section 6 was not one of procedure, but of substance, and so far as the Court having jurisdiction within the Sonthal Parganas are concerned, it places all contractual stipulations as to compound interest in a position of non-enforceability, and limits statutably the total interest which can be decreed on a loan or debt.

The question of jurisdiction which depended on no disputed facts, was in issue in the suit, and had been adjudicated upon in the first Court, was one which their Lordships were of opinion they could not decline to entertain though not specifically raised on the appeal, especially as it necessarily presented itself in argument.

Semble: The provisions of the Scheduled Districts Act (XIV of 1874) have never been extended to the Sonthal Parganas.

THREE consolidated appeals 9, 10 and 11 of 1911 the first from a judgment and decree (3rd April 1907) of the High Court at Calcutta which affirmed a decree (12th February 1906) of the Subordinate Judge of Bhagulpur, the second from a judgment and decree 5th December 1907) of the said High Court which (reversed a decree (19th August 1907) of the said

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Subordinate Judge; and the third from a judgment and decree (18th December 1908) of the said High Court which reversed a decree (6th August 1908) of the said Subordinate Judge.

The defendants were appellants in the first appeal, and the plaintiffs in the second and third appeals, to His Majesty in Council.

The suit out of which the appeals arose was brought by Ramani Mohan Singh and Surendra Mohan Singh against Ram Chandra Singh and others to enforce the provisions of a mortgage bond for Rs. 3,50,000 dated 21st December 1896 in favour of one Suraj Narayan Singh, the father of the plaintiffs. The claim of the plaintiffs up to the date of suit was Rs. 5,36,038-11-10, the balance being made up of interest and compound interest which was charged according to the provisions of the bond in suit at the rate of $7\frac{1}{2}$ per cent. per annum with annual rests. The mortgaged properties were mostly situate in the Sonthal Parganas district, where the mortgagors resided, but about a third was within the local jurisdiction of the Bhagalpur Court: the mortgage bond was admittedly executed at Bhagalpur, and contained a provision for its enforcement in the Bhagalpur Court.

The only defences now material were raised in issues (1) "Whether the Bhagalpur Court had jurisdiction to try the suit?"; and (6) "Are the plaintiffs precluded from claiming compound interest, or interest exceeding the amount of principal advanced, under Regulation III of 1872?"

Section 6 of the Sonthal Parganas Settlement Regulation alluded to in the sixth issue is as follows:—

"(6) All Courts having jurisdiction in the Sonthal Parganas shall observe the following rules relating to usury namely:—

"(*a*) No compound interest arising from any intermediate adjustment of account shall be decreed.

"(*b*) The total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan"

And the explanation of the expression "intermediate adjustment" was added by section 24 of Bengal Regulation V of 1893, as follows:—

"The expression 'intermediate adjustment of account' in clause (*a*) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise when, without the passing of fresh consideration, the original claim is increased by such renewal."

The Subordinate Judge decided the suit in favour of the plaintiffs and gave them a decree. On the 6th issue he was of opinion that section 6 of Regulation III of 1872 did not apply; that the Bhagalpur Court was not a "Court having jurisdiction in the Sonthal Parganas; and that the rights of the parties were governed by the law in force at Bhagalpur, where the contract was made.

On appeal by the defendants, the High Court (RAMPINI and SHARFUDDIN JJ.) said as to section 6 of Regulation III of 1872.

"The Subordinate Judge says that in his opinion the provisions of section 6 of Regulation III of 1872 do not apply to Courts exercising jurisdiction within the Sonthal Parganas under section 19 of the Civil Procedure Code. He thinks that these words relate only to the Courts of the Sonthal Parganas exercising jurisdiction within their territorial limits, and it would appear to us that the Subordinate Judge's view upon this matter is correct. We are relieved of the necessity of discussing this question at any great length because it was decided by this Court in Regular Appeal 467 of 1902, in a judgment dated 16th December 1903, to which one of the members of this Bench was party. In that judgment occurs the following passage. 'The appellant's' fifth plea is founded on the terms of section 6 of the Settlement Regulation III of 1872, according to which no Court having jurisdiction in the Sonthal Parganas can decree compound interest arising from any intermediate adjustment of account, or a larger amount of interest than the original debt. But the words 'Court having jurisdiction in the Sonthal Parganas,' occurring in the section must, in our opinion, refer to a Court in the Sonthal Parganas, and

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constituted under the Regulation. They cannot include a Court, such as that of the Subordinate Judge of Bhagalpur when dealing with a suit the cause of action in which has arisen within his jurisdiction, and not in the Sonthal Parganas, and which has only jurisdiction in the Sonthal Parganas in the sense that it has power to order the sale of some of the mortgaged property which is situated in that district. Two cases have been cited for the appellants, namely, *Dungaram Marwari* v. *Rajkishore Deo* (1) and *Shama Charan Misser* v. *Chuni Lal Marwari*(2). They do not appear to be in point, or to throw any light upon the question now under discussion. There is certainly nothing in them which in any way conflicts with the view expressed above.' Mr. Eardley Norton for the appellant has cited another case, namely that of *Maseyk* v. *Steel & Co.* (3). But it does not appear to us that this case in any way supports his contention. We accordingly see no reason to dissent from the view taken by this Court in the judgment above cited. Moreover, our attention has been called to the fact that in the mortgage bond on which the plaintiff now sues the defendants, expressly declared that the loan had been taken at Bhagalpur, and that the plaintiff was entitled to institute a suit in Bhagalpur for the realization of the amount due. It appears that all the loans taken by the defendant from the plaintiff were taken at Bhagalpur; and there was further a stipulation that interest should be paid at Bhagalpur. We therefore think that the suit was properly instituted at Bhagalpur, and that for the reasons above given, the Court at Bhagalpur was not restricted in awarding interest by the provisions of section 6 of Regulation III of 1872."

The High Court accordingly dismissed the appeal with costs.

This appeal was first heard on the question of jurisdiction, and afterwards on the question raised in the 6th issue, namely, whether the Court was precluded from giving compound interest or a total amount of interest exceeding the principal, by section 6 of the Sonthal Parganas Settlement Regulation (III of 1872.)

On the point of jurisdiction,

G. R. Lowndes, for the appellant in appeal 9 and for the respondent in appeals 10 and 11, contended that the Bhagalpur Court had no jurisdiction to

(1) (1890) I. L. R. 18 Calc. 133. (2) (1898) I. L. R. 26 Calc. 238, (3) 1887) I. L. R. 14 Calc. 661.

entertain the suit. That Court can have jurisdiction under section 19 of the Code of Civil Procedure, 1882, only if that Code is in force in the Sonthal Parganas: *see* the grounds of decision in *Ram Ratan* v. *Lalta Prasad* (1). Section 10 of the Sonthal Parganas Justice-Regulation (V of 1893) made the Code partly applicable to certain suits filed in the Sonthal Parganas Courts, and in such suits so filed the Sonthal Parganas Courts might have jurisdiction over land in Bhagalpur; but that section would not apply to a suit filed, like the present suit in the Bhagalpur Courts, or anywhere outside the Sonthal Parganas. That would be the case also with respect to section 2, sub-section (*2*) of the Sonthal Parganas Settlement Regulation (III of 1872), the suits there referred to being only suits filed in Sonthal Parganas Courts: *see* section 2 of the Sonthal Parganas Act (XXXVII of 1855). Except for three partial applications of the Code to suits filed in the Sonthal Parganas, it appeared that the Code did not apply to the Sonthal Parganas. The Civil Procedure Code (Act VIII of 1859) was made applicable to the Sonthal Parganas by the notification of 19th August 1867, which might hold good under section 3, sub-section (*3*) of Regulation III of 1872; but in the Codes of 1877 and 1882 it was specifically provided (*see* section 1, paragraph 2 of each Act) that they should not apply to the Scheduled Districts (including the Sonthal Parganas). The case of *Sorbojit Roy* v. *Gonesh Prosad Misser* (2) is opposed to this contention, but it is submitted that case was wrongly decided; for by section 3, sub-section (*2*) of Regulation III of 1872, "no other Acts than those specified in the schedule" are to apply to the Sonthal Parganas, and the Civil Procedure Code is not among those Acts. That provision must be

(1) (1895) I. L. R. 17 All. 483. (2) (1884) I. L. R. 10 Calc. 761.

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taken to have repealed the notification of 19th August 1867, for the specific enactment in the Civil Procedure Codes (Acts X of 1877 and XIV of 1882) that they should not apply to the Scheduled Districts (including the Sonthal Parganas) would otherwise have no meaning: moreover, those later Codes contain no such power to extend by notification as was provided by section 385 of the Code of 1859. This contention was, it was submitted, supported by (*a*) the fact that even as amended by Regulation III of 1899 (*see* section 3), the schedule to Regulation III of 1872 does not mention the Civil Procedure Code; (*b*) the fact that by the Regulation of 1899 specific sections (223 to 228) of the Code are made applicable to the Sonthal Parganas which would have been unnecessary if the whole Code had already been applicable; and (*c*) the fact that the Civil Procedure Code is, by Regulation V of 1893, section 10, applied only to certain suits in the Sonthal Parganas.

But even if the Civil Procedure Code applied generally to the Sonthal Parganas, the jurisdiction in respect of all suits regarding land was taken away and confined to particular Courts in the Sonthal Parganas by section 5 of Regulation III of 1872, which clearly included mortgage suits, and was not limited to such suits only as would ordinarily come before Settlement Officers. For, from the heading of the Regulation it appeared that it was not merely to provide for a settlement of the Sonthal Parganas; section 6, for instance, was clearly a general provision covering all suits, and the "Settlement" sections seem only to refer to "claims" with which and *not* with suits, a Settlement Officer would ordinarily deal. Under section 5, suits concerning land are to be tried either by Settlement Officer or by Officers appointed under the Sonthal Parganas Act (XXXVII

of 1855), who were themselves the ordinary Courts of the Sonthal Parganas, the whole Civil Jurisdiction over the Sonthal Parganas being vested in them by the Act of 1855 section 2, though they might for convenience sit in places outside the Sonthal Parganas (*see* section 3). There would be nothing strange in mortgage suits being entrusted to them for trial; and as a matter of fact soon after Regulation III of 1872 was passed, a notification (dated 7th May 1872) was issued assigning the trial of all land suits to the officers appointed under the Act of 1855. Then the question arises whether the provision with regard to such suits under section 5 of Regulation III of 1872 has become inoperative owing to a notification of the completion of the settlement. The first settlement was no doubt completed in 1879 (*see* the Gazetteer of the Sonthal Parganas); but no notification of completion seems to have been published in the Gazette; at any rate no such notification can be found. If section 5 had become inoperative by reason of the settlement being completed, its re-enactment would have been necessary for the second settlement which began about 1886 (see Regulation II of 1886, section 6): but there was no such re-enactment (*see* the amendment of section 5 in 1908 for the purpose of the latest settlement). Besides, there were several amending Acts between 1872 and 1908, and if section 5 had become inoperative it would have been repealed. The reference in section 9 of the Regulation of 1893 to suits over Rs. 1,000 which are excluded from the cognizance of the ordinary Civil Courts, must refer to the land suits under section 5 of the Regulation of 1872, and shows that they were still supposed to be so excluded. There seems, therefore, no reason to assume that section 5 of the Regulation of 1872 had become

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inoperative before the present suit was filed, and if it was still in operation no Courts other than those referred to in the section could deal with such a suit as this. Section 5 contains both a prohibition against any other Courts trying such suits, and a positive enactment that the particular Courts referred to shall do so: this, if still in force, would clearly exclude the jurisdiction of the Bhagalpur Court.

Sir R. Finlay K.C., *De Gruyther K.C.*, and *A. M. Dunne*, for the respondents in appeal 9 and appellants in appeals 10 and 11, contended that the Bhagalpur Court had jurisdiction to entertain the suit. The question was whether the Civil Procedure Code applied to the Sonthal Parganas or not; if it did, as, it was submitted, was the case, then the district of the Sonthal Parganas was in the same position as any other district in British India. By Act XXXVII of 1855 the Sonthal Parganas were removed from the operation of the general laws and regulations, and placed under the superintendence of specially appointed officers (*see* the preamble and section 1, clauses (*2*), (*5*) and (*6*). The Act provided that "no law hereafter passed should extend to the district" unless specially named therein, and that "all civil suits over Rs. 1,000 should be tried and determined in the same manner as if Act XXXVII had not been passed." That meant, it was submitted, that suits above that value were to remain unchanged and be tried as they were before the Act was passed, which was by the ordinary law of India; and that had been held to be so in *Sorbojit Roy* v. *Gonesh Prosad Misser* (1). The Civil Procedure Code (Act VIII of 1859) by section 385 enacted that it should not apply in any part of the territories "not subject to the general laws and regulations," of (among other districts) Bengal, unless

(1) (1884) I. L. R. 10 Calc. 731.

specially extended thereto by notification in the Gazette, and the Sonthal Parganas being such a district of Bengal, Act VIII of 1859 was extended to it by notification of 19th August 1867 published in the Gazette. Then was passed the Sonthal Parganas Settlement Regulation (III of 1872) which by section 2 was to be read with Act XXXVII of 1855 and by section 3 the jurisdiction of the ordinary Civil Courts to try suits over Rs. 1,000 was not altered where such suits were tried in Courts established under the Bengal Civil Courts Act (VI of 1871). Section 4 of Regulation III of 1872 empowered the Lieutenant Governor by notification to invest any competent officer in the Sonthal Parganas with the powers of a Civil Court established under Act VI of 1871. But this by section 5 was not to be done pending the settlement which was to be made of all the land in the Sonthal Parganas; for it says, "until settlement of the whole, or any part of the land of the Sonthal Parganas shall have been completed no suit shall lie as regards land in any Court under Act VI of 1871 except as is hereinafter provided;" and then it goes on to say that "such suits shall be heard and determined by the officers appointed under Section 2 of Act XXXVII of 1855 or by the Settlement Officers." Then, did section 5 exclude from the jurisdiction of Courts under Act VI of 1871 suits for land of the value of over Rs. 1,000? It was submitted it did not, because it only applied to questions of title to land, and not to a suit like the present to enforce a mortgage. It also only referred to Civil Courts in the Sonthal Parganas and not to Courts outside them. Such suits were not intended to be "tried and determined" by the Settlement Officers, whose duties under Regulation III of 1872 were to determine the names of those entitled to be recorded as owners of the land, and to make out the

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record of rights. It is questionable whether Section 5 of the Regulation of 1872 applied at all except between the date of the Regulation and the completion of the settlement, which was in 1879: *see* Hunter's Imperial Gazetteer, Vol. 22, page 75. It was shown that at the time the present suit was brought in June 1904, the settlement of some parts of the Sonthal Parganas, in which the mortgaged property was situated, had been completed. Sections 3 of the Civil Procedure Code of 1877 (which repealed the Code of 1859 and its amending Acts) provided that wherever the repealed Code was mentioned in any Act prior to the Code of 1877 coming into force, such reference should be taken to be to the Code of 1877; and so made the last named Code applicable to the Sonthal Parganas, and in the same way the later Civil Procedure Code (Act XIV of 1882) was made applicable to the Sonthal Parganas on the repeal of Act X of 1877. Regulation V of 1893 (the Sonthal Parganas Justice Regulation) showed that the Civil Procedure Code did apply to the Sonthal Parganas: *See* Section 10. It could have been extended by notification at any time after the Scheduled Districts Act (XIV of 1874) was passed, and probably it was so extended though no such notification had been found. The present suit could have been brought in a Court in the Sonthal Parganas where the Civil Pcocedure Code would have applied. The mortgaged property is partly in the Sonthal Parganas and partly in Bhagalpur, and the suit has been brought in the Bhagalpur Court which, it is submitted, has jurisdiction to try it under section 19 of the Civil Procedure Code, 1882. Reference was made to *Sorbojit Roy* v. *Gonesh Prosad Misser* (1), and *Ram Ratan* v. *Lalta Prasad* (2). In the latter case the Moradabad Court would have had jurisdiction but for the fact that section 2 of the

(1) (1888) I. L. R. 10 Calc. 761. (2) (1895) I. L. R. 17 All. 483.

Civil Procedure Code, 1882, which defines "District," and gives a special meaning to it was excluded from consideration when dealing with the Tarai. There was in the mortgage bond in the present suit a stipulation that the Bhagalpur Court should have jurisdiction to deal with the suit, and that the plaintiff would be entitled to bring his suit in that Court. In the course of the argument reference was also made to Bengal District Gazetteer (Ed. 1910, Calcutta), "Sonthal Parganas" Volume 22, pages 58, 214; Bengal Code, Volume V, pages 222, 268; Settlement Manual, Sonthal Parganas, page 96; Regulation III of 1872, sections 3, 6, 7, 11, 12, 13, 14, 17, 18, 25, 26; Calcutta Gazette, July to December 1867, page 1368; Civil Procedure Code (1859), sections 11 and 12; (1882) sections 15, 16, 17, and 23; Regulation V of 1893, clauses (i) and (iii), and sections 7, 8, 9, 10; and Bengal United Provinces, and Assam Civil Courts Act (XII of 1887).

Lowndes, in reply. The notification of 1867 which substituted the Civil Procedure Code of 1877 for the Code of 1859 had not the effect of making the Code of 1877 applicable to the Sonthal Parganas. To be effective such a notification must be published under the Act which gives power to make it applicable. But the Code of 1877 gives no power to make the Code applicable by notification. The schedule to Regulation III of 1872 makes only certain Acts (among which the Code of 1859 is not mentioned) applicable to the Sonthal Parganas. The Regulation of 1872 therefore repealed the notification of 1867, and the Code of 1859 ceased to apply. The whole of the Civil Justice was vested in the special officers appointed under Act XXXVII of 1855, and District Courts, if any, ceased to exist. The notification of 6th August 1873 was only a direction to those officers appointed under

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it, and not a proviso or exception. The exception in Regulation III of 1872, section 3, clause (*2*) means that other Acts may apply and only applies just as section 10 of Regulation V of 1893 does, to particular suits in the Sonthal Parganas. Reference was made to *Dungaram Maruari* v. *Rajkishore Deo* (1) which decided that the Courts in the Sonthal Parganas were the Courts constituted under section 4 of Regulation III of 1872 by vesting the officers appointed under Act XXXVII of 1855 with the powers of Courts under Act XII of 1887. Regulation III of 1872 specifically applies only to particular sections of the Civil Procedure Code. The notification of 6th August 1873 included all kinds of suits. By the judicial notification of 7th May 1872 the Government gave under sections 25 and 26 of Regulation III of 1872, to officers appointed under Act XXXVII of 1855 powers as regards suits relating to land, etc. Section 5 of Regulation III of 1872 was not confined to suits in settlement matters. On the question whether it ceased to be operative, section 9 must be looked at under which the notifications of 8th June 1872, Calcutta Gazette Part I, page 2386; 6th October 1873, Calcutta Gazette Part II, page 1168; and 2nd October 1875, Calcutta Gazette Part II, page 1297 were published. Section 5 did not mean that as soon as the settlement of a particular district or part of it was made, the section ceased to apply. The section would not cease to apply until a notification was issued on completion of the settlement. There has never been such a notification published, though there are two notifications in respect of some partial settlement of some of the districts.

[*Sir R. Finlay K.C.* As soon as the settlement of a district was completed, a notification must have been

(1) (1890) I. L. R. 18 Calc. 133.

issued, and the jurisdiction of the Settlement Officers ceased, and that of the ordinary Courts was restored].

The settlement was not completed in 1879, as was contended on the authority of Hunter's Gazetteer. The new Settlement Act of 1886 showed that: *see* notifications of 13th March 1893, Calcutta Gazette page 204, and 31st December 1894, Calcutta Gazette page 171: and there was no notification of the completion of the settlement under the Act of 1886, but only two notifications of partial completion. As the settlement therefore was not completed, there was no notification to that effect, and therefore section 5 did not cease to be operative. [*Sir R. Finlay*, as to the principles to be applied in considering a new point raised on appeal, referred to *Owners of Ship "Tasmania"* v. *Smith* (1), *Owners of S.S. "Pleiades"* v. *owners of S.S. Jane* (2), and Safford and Wheeler's Privy Council Practice, page 852; no new question requiring ascertainment of facts should be allowed to be raised on appeal.] The point was not a new one: it is in issue in the suit, and went up to the High Court after being adjudicated upon by the Subordinate Judge.

It was then contended, on the merits of the case, that the provisions of section 6 of Regulation III of 1872 applied to the plaintiffs' claim, so far as the Bhagalpur Court had jurisdiction to decree a sale of that part of the mortgaged property which was situated in the Sonthal Parganas; and that the Bhagalpur Court was to that extent and for that purpose a "Court having jurisdiction" in the Sonthal Parganas. Assuming the Bhagalpur Court to have jurisdiction to try the suit under section 19 of the Civil Procedure Code, 1882, and that the parties had by the provisions of the mortgage bond chosen that Court

(1) (1890) L. R. 15 A. C. 223, 225. (2) [1891] A. C. 259, 263.

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as their forum, still the law to be applied was the law of the Sonthal Parganas which did not allow interest beyond the limits of section 6 of Regulation III of 1872. This law against usury was clearly one for the protection of the people and the land in the Sonthal Parganas. Then does the agreement of the parties under the mortgage take the case out of the operation of section 6? [LORD SHAW referred to the case of *Hamlyn & Co.* v. *Talisker Distillery Company* (1)]. They could not, it was submitted, contract themselves out of section 6, for suits respecting land are governed by the law of the *locus rei sitæ*. To hold otherwise would be to evade the Regulation. The case referred to was distinguishable. The question was more than one of procedure: it had reference to public policy with respect to section 6 of Regulation III of 1872, and section 24 of Regulation V of 1893. All the intermediate mortgages fell within the mortgage in suit [*Sir R. Finlay K.C.* referred to *Ram Chandra Marwari* v. *Keshobati Kumari* (2) to show that a suit was brought in the Court of a Subordinate Judge constituted under Act VI of 1871, and the ordinary law was applied, and that suits like the present were ordinarily brought in the ordinary Civil Courts] considerations applicable to mere money suits against residents in the Sonthal Parganas had no application to a suit on a mortgage. The jurisdiction under section 19 of the Civil Procedure Code, 1882, was given for convenience of trial and could not be intended to vary the law applicable. The Bhagalpur Court would under section 19 clearly be a Court "having jurisdiction" in the Sonthal Parganas; and under section 223 of the Code it would have jurisdiction to sell. Reference was made to *Maseyk* v.

(1) [1894] A. C. 202.

(2) (1909) I. L. R. 36 Calc. 840; L. R. 36 I. A. 85.

Steel & Co.(1). To hold, as the High Court did, that section 6 only referred to Courts in the Sonthal Parganas, would be to strike out the words "having jurisdiction." It was submitted that section 6 of Regulation III of 1872 was applicable, and that all previous bonds were "intermediate adjustments of account." The plaintiff therefore could only get a decree for all the principal, and interest equal to the total amount; and in calculating the interest credit should be given for the amount of interest paid from time to time [LORD SHAW. The section puts a limit only on the amount of the interest to be *decreed*].

Sir R. Finlay K. C., *DeGruyther K. C.*, and *A. M. Dunne*, on the merits, contended that the jurisdiction of the Bhagalpur Court to decree interest was not affected by the provisions of section 6 of Regulation III of 1872. The intention was, it was submitted, to confine that section to Courts exercising jurisdiction in the Sonthal Parganas. There was nothing in the Civil Procedure Code, 1882, to show that the Bhagalpur Court is such a Court. The case of *Maseyk* v. *Steel & Co.* (1) was wrongly decided. In the Civil Procedure Code, sections 16 and 17, "where the cause of action arises," means where most of the breaches of contract take place; see *Vaughan* v. *Weldon* (2), a case mentioned in Stokes' Anglo-Indian Codes, Civil Procedure Code, Sections 18 and 19. [MR. AMEER ALI referred to *Gopi Mohun Roy* v. *Doybaki Nundun Sen* (3); and *Lowndes* to *Shurroop Chunder Gooho* v. *Ameerunnissa Khatoon* (4), on the same point as *Maseyk* v. *Steel & Co.* (1)]. The Courts that are spoken of as "having jurisdiction" in the Sonthal Parganas mean Courts in the Sonthal Parganas. The object of section

(1) (1887) I. L. R. 14 Calc. 661, 667.
(2) (1874) L. R. 10 C. P. 47.
(3) (1891) I. L. R. 19 Calc. 13.
(4) (1882) I. L. R. 8 Calc. 703.

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6 must be confined to local limits. It effects a limitation of the powers of the Courts in the Sonthal Parganas as to the amount of interest. The suit here is to recover money lent, and if not paid to sell the security for the loan. No question of jurisdiction or of the application of section 6 arises as to the claim for money lent, and all the Bhagalpur Court had to do in realizing the security was to make a decree, and not to deal with the execution of the decree of another Court. Reference was made to *Hamlyn & Co.* v. *Talisker Distillery Company* (1) where in deciding what law was to be applied, English law or Scotch law, the intention of the parties was taken into consideration which was that the English law should be applicable; and that case was relied on. In the present case the parties have in the mortgage respectively elected to sue and be sued in the Bhagalpur Court. The defendant cannot now say that Court has no jurisdiction. It had jurisdiction under section 17 of the Civil Procedure Code, 1882, for the first part of the claim, and under section 19 in respect of the second part. Regulation III of 1872 was not an Act of the Legislature. It was issued by the Lieutenant-Governor in his executive capacity, and can have no effective operation outside the Sonthal Parganas. If it were intended to have any effect beyond section 19 of the Civil Procedure Code, it is *ultra vires*, for the Lieutenant-Governor had no power to control the provisions of that Code. The Courts having jurisdiction in the Sonthal Parganas were the ordinary Zillah Courts: See Cowell's Courts and Legislative authorities in India, page 113. Reference was made to the Bengal Civil Courts Act (VI of 1871) section 12; and the Gazetteer for the Sonthal Parganas, page 54,

(1) [1894] A. C. 202, 207.

and Chapter XIII, page 297. The Courts were not always sitting in the Sonthal Parganas. Prior to 1872 Courts outside the Sonthal Parganas, namely, those at Bhagalpur and Beerbhoom exercised the powers of Civil Courts in the Sonthal Parganas ; and after that year the jurisdiction was transferred to certain especially appointed officials in the Sonthal Parganas : *see* Regulation V of 1893, sections 5, 7, 9 and 15. The words of section 6, " all Courts having jurisdiction in the Sonthal Parganas," mean "all Courts within the Sonthal Parganas." The Court at Bhagalpur was not a Court having jurisdiction in the Sonthal Parganas within the meaning of that section: *see* Sonthal Parganas Manual, " Rules of Procedure to be adopted in Courts in the Sonthal Parganas " which are not applicable outside the Sonthal Parganas.

Lowndes, in reply, referred to *Maseyk* v. *Steel* (1), and the series of similar cases: *Shurroop Chunder Gooho* v. *Ameerunnissa Khatoon* (2), *Kartick Nath Pandey* v. *Tilukdhari Lall* (3), *Tincouri Debya* v. *Shib Chandra Pal Chowdhury* (4) and *Jagernath Sahai* v. *Dip Rani Koer* (5). As to the suggestion that the words " having jurisdiction in the Sonthal Parganas," applied to the Bhagalpur and Beerbhoom Courts which after Act XXXVII of 1855 acted as District Courts of the Sonthal Parganas, it was submitted (i) that those Courts were still strictly Sonthal Parganas Courts constituted under section 2 of the Act of 1855, though for convenience sitting in places outside the Sonthal Parganas under section 3 of that Act; (ii) that on the date when Regulation III of 1872 was published it was notified that those particular Courts

(1) (1887) I. L. R. 14 Calc. 661.
(2) (1882) I. L. R. 8 Calc. 703.
(3) (1888) I. L. R. 15 Calc., 667.
(4) (1894) I. L. R. 21 Calc. 639.
(5) (1895) I. L. R. 22 Calc. 871.

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should cease to have jurisdiction in the Sonthal Parganas, and it could not therefore have been intended to refer to them in section 5 of the same Regulation; and (iii) that if section 5 was intended to apply to Courts outside the Sonthal Parganas, as argued for the plaintiff, it clearly applied to the Bhagalpur Court and excluded suits regarding land in the Sonthal Parganas from that jurisdiction. Regulation III of 1872 was passed under the Statute 33 & 34 Vict. c. 3, s. 1. It was part of the substantive law, and just as good a law as any other law of the Empire, and with the same validity.

[The appeals 10 and 11 stood over pending the decision in appeal 9.]

The judgment of their Lordships was delivered by

May 19. LORD MOULTON. In this case their Lordships have to deal with three consolidated appeals from decrees of the High Court of Judicature at Fort William in Bengal, arising out of a mortgage suit filed in the court of the Subordinate Judge at Bhagalpur in Bengal. The first and principal appeal is from the decree of the Subordinate Judge enforcing the mortgage, which was affirmed on appeal by the High Court. Subsequently to making that decree the Subordinate Judge made two orders varying the same, both of which were on appeal set aside by the High Court. From these two orders of the High Court appeals have been brought by the respondents to the main appeal, and they constitute the second and third of the consolidated appeals.

The mortgage bond, to enforce which the action was originally brought, was a bond for Rs. 3,50,000, dated the 21st December 1896, in favour of Babu Suraj Narayan Singh, the father of the principal respondent, and secured on lands situated in the Sonthal Parganas

and elsewhere. The mortgagors were members of a joint Hindu family. Inasmuch as no question arises in this appeal as to the parties to the present action being the proper parties, it will be convenient to call the appellants in the principal appeal the mortgagors and the respondents the mortgagees.

The bond sued on was the last of a series of bonds for increasing amounts. The total of the principal amounts advanced was, according to the statements in the plaint, Rs. 2,85,903-1-9. But the total claim of the mortgagees at the date of suit was Rs. 5,36,038-11-10, the balance being made up of interest which was charged according to the provisions of the different bonds, the rate under the bond in suit being 7½ per cent. per annum with annual rests. By far the greater portion of the mortgaged properties was situated in the district of the Sonthal Parganas, and the mortgagors resided in that district. The remainder of the mortgaged property was situated within the local jurisdiction of the Bhagalpur Court.

The bond in suit was executed at Bhagalpur and contained a stipulation that the mortgagees might enforce it in the Bhagalpur Court.

The suit was commenced on June 20th, 1904. The plaint shows that it was an ordinary suit to enforce a mortgage. Written statements of defence were put in by various defendants and various issues were raised and decided by the Subordinate Judge at the trial. Most of these relate to matters no longer in dispute. The only issues that remain for their Lordships' decision in this appeal turn on the fact that the mortgagors reside and the chief part of the property is situate in the Sonthal Parganas, so that it is not necessary further to refer to the other issues.

The judgment of the Subordinate Judge, which is dated February 12th, 1906, was in favour of the

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mortgagees on all issues. On the appeal to the High Court the argument seems to have been confined to the sixth issue, which was in the following term :—

"Are the plaintiffs precluded from claiming from compound interest, or interest exceeding the amount of the principal advanced under Regulation III of 1872 ?"

The High Court found in favour of the mortgagees on this issue, and from that decision the present appeal is brought. But in the hearing before the appellant's Judge an issue was raised as to the jurisdiction of the Subordinate Court of Bhagalpur to entertain the suit, and this point has again been raised in the argument before their Lordships. Seeing that it is a question of jurisdiction, and depends on no disputed facts, their Lordships are of opinion that they cannot decline to entertain it, although it is not specifically raised on the appeal, more especially as it necessarily presented itself in the argument.

The position of the Sonthal Parganas is very peculiar. They are under separate and special legislation, which differs widely from the legislation applicable to the rest of Bengal. The Lieutenant-Governor of Bengal has the power to vary that legislation from time to time by notifications published in the Calcutta Gazette, under and according to provisions appearing in the Regulations relating to the district as will presently be more particularly referred to. At the hearing of the appeal it was found that the documents in the record did not adequately inform their Lordships of the relevant notifications which had thus appeared in the Calcutta Gazette, and, accordingly, it was arranged that the parties should supplement the record by putting in copies of such notifications as they thought material. These were furnished to their Lordships in December last, and they affect to an important degree the matters in

issue, and more particularly those that turn upon the settlement of the lands to which the mortgage bond relates.

In order to make clear the legal questions that arise in this appeal, it is necessary to explain the nature and sequence of the legislation relating to the Sonthal Parganas.

The special legislation for the Sonthal Parganas commences by an Act of the Governor-General of India in Council, No. XXXVII of 1855, which was passed on December 22nd, 1855. Its full title is :—

"An Act to remove from operation of the General Laws and Regulations certain districts inhabited by the Sonthals and others and to place the same under the superintendence of an officer to be specially appointed for that purpose."

The preamble of the Act recites that the General Regulations and Acts of Government then in force in the Presidency of Bengal were not adapted to the uncivilised race of people called Sonthals, and it was therefore deemed expedient to remove from the operation of such laws certain districts. It then proceeded to enact by clause 1, as follows :—

"The districts described in the Schedule to this Act are hereby removed from the operation of the General Regulations of the Bengal Code and of the Laws passed by the Governor-General of India in Council except so far as is hereinafter provided and no law which shall hereafter be passed by the Governor-General of India in Council shall be deemed to extend to any part of the said districts unless the same shall be specially named therein."

This is subject to a proviso which is not material to this case.

The Act then proceeds to carry out its main object by the following enactment :—

"The said districts shall be placed under the superintendence and jurisdiction of an officer or officers to be appointed in that behalf by the Lieutenant-Governor of Bengal. . . . . The administration of civil and criminal justice, . . . are hereby vested in the officer or officers so appointed."

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This language is perfectly general in its character, and under it the whole administration of civil justice became vested in the officer or officers so appointed. But there follows a proviso to which frequent reference was made in the argument. It reads as follows:—

"Provided that all civil suits in which the matter in dispute shall exceed the value of Rs. 1,000 shall be tried and determined according to the General Laws and Regulations in the same manner as if this Act had not been passed."

The interpretation of this provision is a matter of great difficulty. Two rival interpretations naturally suggest themselves. The one is that the officers exercising the jurisdiction shall do so in accordance with the general laws and regulations, so that the rights of the parties are unaffected by the provision, although they are to be pronounced upon by a different judicial tribunal. The other is that not only the laws that govern rights, but also the procedure to enforce those rights is to remain unchanged. Now it must be observed that this is a proviso and not an exception, and accordingly, taken in connection with the general language of the previous portion of the clause, the former of these two interpretations is the one that commends itself to their Lordships, so that it must be construed as providing that the special officer or officers shall try such suits, but that in trying and determining them they shall observe the General Laws and Regulations obtaining in Bengal, which but for the Act would have applied equally in the Sonthal Parganas. It would seem, however, that the other view has been taken in India: *see* the judgment in *Sorbojit Roy* v. *Gonesh Prosad Misser* (1). Subsequent legislation has, however, rendered it unnecessary, so far as the decision in this case is concerned,

(1) (1884) I. L. R. 10 Calc. 761.

to decide what would be the state of things if this Regulation were still in force unmodified by any other statutory enactments.

The territorial definition of the Sonthal Parganas was originally to be found in the schedule to this Act; but, by Act X of 1857, a new schedule was substituted therefor. The judgment of the High Court finds that two-thirds of the mortgaged properties are situated within the district described in that schedule, and it would seem that this estimate may be assumed to be approximately correct for the purposes of this appeal.

The next Act in chronological order to which it is necessary to refer is the Code of Civil Procedure of 1859. The Sonthal Parganas are not specially named in that Act, and therefore it did not *prima facie* apply to them; but, nevertheless, we must have regard to the language of section 385 of that Act, which reads as follows:—

> "This Act shall not take effect in any part of the territories not subject to the General Regulations of Bengal, Madras and Bombay, until the same shall be extended thereto by the Governor-General of India in Council or by the Local Government to which such territory is subordinate and notified in the Gazette."

Although the words "Sonthal Parganas" do not appear in this section the district falls under the description there appearing. Accordingly, we find that by a notification on August 19th, 1867, the Code of Civil Procedure, 1859, as amended by the Code of Civil Procedure, 1861, was applied to the Sonthal Parganas subject to certain provisions, restrictions and exceptions which are not relevant to the matters of this suit.

It is not necessary to decide what was the precise effect of this notification. It can hardly have been intended that it should apply to the Courts held by the officers appointed by the Lieutenant-Governor of

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Bengal in those suits in which they were not required to try and determine the case according to the general laws and regulations prevailing in Bengal. But with regard to civil suits in which the matter in dispute exceeded the value of Rs. 1,000, it would seem to have settled the doubt as to whether they were cognizable by ordinary Civil Courts duly established with jurisdiction within the Sonthal Parganas, because it will be found that the fact that such jurisdiction exists in such Courts is recognized in subsequent legislation.

In the year 1872 a new Regulation was passed for the Sonthal Parganas. It is entitled the Sonthal Parganas Settlement Regulation, and by clause (*2*) it is directed to be read with Act XXXVII of 1855 and Act X of 1857 before referred to. Clause (*3*) reads as follows:—

"Subject to the provisions of this Regulation, the Regulations and Acts mentioned in the schedule annexed to this Regulation, or such portions of them as are unrepealed, shall be deemed to be in force in the Sonthal Parganas. No other Regulations or Acts shall be deemed to be in force in the Sonthal Parganas, except so far as regards the trial and determination of the civil suits mentioned in Section 2, Act XXXVII of 1855, in which the matter in dispute exceeds the value of Rs. 1,000, when such suits are tried in the Courts established under Act VI of 1871."

It further provides that the Lieutenant-Governor of Bengal may by notification in the Calcutta Gazette add to, or take away from, the list in the schedule.

To arrive at the true meaning and effect of these provisions it is necessary to bear in mind that at the date of this Regulation the Code of Civil Procedure 1859, as amended by the Code of Civil Procedure, 1861, applied to the Sonthal Parganas by virtue of the notification of August 19th, 1867. But the schedule to the Regulation does not contain the Civil Procedure Codes of 1859 and 1861, nor have they ever been added to the above list by any notification of the Lieutenant-Governor of Bengal as above described. It follows

that these Civil Procedure Codes were thereafter applicable in the Sonthal Parganas only so far as concerns the trial and determination of civil suits in which the matter in dispute exceeded the value of Rs. 1,000 when such suits were tried in the Courts established under Act VI of 1871. So far as such suits were concerned there is nothing in this clause of the Sonthal Parganas Settlement Regulation to alter the effect of the Notification of August 19th, 1867, which applied to them the Civil Procedure Code of 1859 as amended in 1861.

Act VI of 1871 is known as the Bengal Civil Courts Act, 1871. It is not in the scheduled list. But it was passed at a date when the Code of Civil Procedure, 1859, as amended by the Code of Civil Procedure, 1861, was in force in the Sonthal Parganas, and it would seem as though the wide provisions of the clauses in those Codes giving jurisdiction to Civil Courts must be taken to have given to the Government power to appoint Judges under it within the Sonthal Parganas, inasmuch as section 4 of the Sonthal Parganas Regulation, 1872, provides as follows :—

"The Lieutenant-Governor of Bengal may, by notification in the Calcutta Gazette, invest any competent officer in the Sonthal Parganas with the powers of any Civil Court established under Act VI of 1871, and may exclude the whole or any part of the said Parganas from the jurisdiction of any of the Courts established under the said Act now having jurisdiction therein."

But while it is evident that the Government by this section left it to the Lieutenant-Governor of Bengal to decide in future whether Courts established under the Bengal Civil Courts Act, 1871, should retain jurisdiction within the Sonthal Parganas, it had already made up its mind that such should not be the case with suits relating to lands pending the completion of the settlement which they proposed forthwith to make of all the lands situated in the Sonthal

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Parganas. This is made clear by section 5 which reads as follows:—

"Till such time as a settlement of the whole or any part of the Sonthal Parganas shall be made under the rules hereinafter provided, and the said settlement shall be declared by a notification in the Calcutta Gazette to have been completed and concluded, no suit shall lie in any Court established under the said Act VI of 1871 in regard to any land, or any interest in or arising out of any land, or for the rent or profits of any land, or regarding any village-headship or other office connected with the land, except as hereinafter provided; but such suits shall be heard and determined by the officers appointed by the Lieutenant-Governor of Bengal under section 2 of the said Act XXXVII of 1855, or by the Settlement Officers hereinafter mentioned, according as the said Lieutenant-Governor shall from time to time direct."

Then follows a proviso by which the officer empowered to try a suit may transfer it to a Court established under the said Act, and thereby give to the Court jurisdiction to try it. No question, however, under this proviso, arises in the present case.

The critical question in this suit is as to whether section 5 excludes from the jurisdiction of Courts established under the Bengal Civil Courts Act, 1871, suits relating to land where the value of the matter in dispute is more than Rs. 1,000. Their Lordships are of opinion that to this question only one answer can be given. The language of the section is so wide and so peremptory that it gives to the officers therein mentioned sole and exclusive jurisdiction in all suits in regard to any land, or any interest in or arising out of any land, or for the rent or profits of any land. To make the meaning clearer and to render the language more emphatic, it is expressed both in the positive and in the negative form. On the one hand it provides that "no suit shall lie in any Court established under the said Act VI of 1871 in regard to any land, &c.," and on the other hand it provides that such "suits shall be heard and determined by the officers,

&c.," It is impossible not to give to such language the full effect of creating an exclusive jurisdiction. It follows, therefore, that no action relating to land in the Sonthal Parganas can be brought otherwise than before such officers so long as section 5 is in force with respect to the district in which that land is situated. There is no difficulty in comprehending the motives for such legislation. The section shows that a settlement of the lands was in contemplation, and evidently the aim of the provision was to prevent any clash of jurisdiction between different Courts in matters relating to land until such time as the Government proclaimed the settlement to be completed—a very intelligible policy when it is considered that on the results of such suits between individuals might depend the entries which must be made in the settlement records.

The object of the Regulation being thus to throw the whole of the jurisdiction in suits relating to land into special Courts established in and for the Sonthal Parganas, and provision being made for extending that exclusive jurisdiction to all suits, one has to consider the meaning and effect of section 6, which is the section upon which the rights of the parties in the present suit depend. That section, so far as is material, reads as follows :—

"All Courts having jurisdiction in the Sonthal Parganas shall observe the following rules relating to usury, namely :—

"(*a*) . . . . no compound interest arising from any intermediate adjustment of interest shall be decreed;

"(*b*) the total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum, if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan."

The respondents sought to establish that the phrase "all Courts having jurisdiction in the Sonthal Parganas" meant Courts locally situated in the Sonthal

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Parganas, and dealing with matters purely local. Their Lordships cannot accept this interpretation. The words are definite and precise, and must be applied in their natural signification. It was urged that, taken literally, they would apply to everything done by a Court having jurisdiction in the Sonthal Parganas, whether the matter related to those districts or not, inasmuch as the language used makes the application of the enactment depend on the Court and not on the matter in dispute. But this is to ignore the fact that the Regulation is only applicable to the Sonthal Parganas, and that, therefore, it would not apply to Courts having jurisdiction wider than these local limits when such Courts were dealing with matters relating solely to other parts of India. The enactment therefore, applies to Courts having jurisdiction in the Sonthal Parganas, and acting under and by virtue of such jurisdiction.

The importance of the section is very great. It is a protective section clearly dictated by the fundamental consideration to which reference has already been made, and which led to the Sonthal Parganas being put under separate and special legislation, namely, that—

> "The General Regulations and Acts of Government now in force in the Presidency of Bengal are not adapted to the uncivilised race of people called Sonthals, and it is, therefore expedient to remove from the operations of such laws."

the districts known as the Sonthal Parganas.

The provision, therefore, is not one of procedure but of substance, and so far as the Courts having jurisdiction within the Sonthal Parganas are concerned, it places all contractual stipulations as to compound interest in a position of non-enforceability, and limits statutably the total interest which can be decreed on any loan or debt. The application of these provisions

to the facts of the present case will be considered later.

The next Act in chronological sequence to which reference was made in the argument is Act XIV of 1874, known as the Scheduled Districts Act, 1874. This is an Act for the purpose of removing doubts as to what Acts or Regulations are in force in parts of British India, which have never been brought within or have from time to time been removed from the operation of the general Acts and Regulations and jurisdiction of the ordinary Courts of Judicature. These parts of British India are termed in the Act "Scheduled Districts." They are all set out in the First Schedule to the Act, and amongst them are to be found the Sonthal Parganas. The scheme of the Act is peculiar. It is expressly made to apply to all parts of British India other than the Scheduled Districts. But it is provided that it shall come into force in any scheduled district upon the issue of a notification under section 3 of the Act with regard to such district. In such case the local government may with the previous sanction of the Governor-General in Council by notification in the Gazette of India, and also in the local Gazette declare (among other things) what enactments are actually in force in any of the scheduled districts, and every such notification shall be binding on all Courts of law. During the argument counsel for the parties were not in agreement as to whether any notification under this Act had been issued applying to the Sonthal Parganas; but from the subsequent information supplied to their Lordships, it would appear that no such notification has been issued, and therefore that the provisions of the Scheduled Districts Act, 1874, have never been applied to them. It is, therefore, unnecessary to discuss further the provisions of this enactment.

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The next Act which requires to be noticed is the Civil Procedure Code, 1877. It repeals Act VIII of 1859 and Act XXIII of 1861, which constituted the then existing Code of Civil Procedure. Section 1 reads as follows :—

"This Act may be cited as 'The Code of Civil Procedure' and it shall come into force on the first day of October 1877.

"This section and section 3 extend to the whole of British India. The other sections extend to the whole of British India except the scheduled districts as defined in Act No. XIV of 1874."

The relevant part of section 3 reads as follows :—

"The enactments specified in the First Schedule hereto annexed are hereby repealed to the extent mentioned in the third column of the same schedule.

"But when in any Act, Regulation or notification passed or issued prior to the day on which this Code comes into force reference is made to Act VIII of 1859, Act XXIII of 1871, or 'The Code of Civil Procedure' or to any other Act hereby repealed, such reference shall so far as may be practicable be read as applying to this Code or the corresponding part thereof."

The effect of these sections is to make the notification of 1867 relative to the application of the then existing Codes of Civil Procedure to the Sonthal Parganas read as though it applied to the Civil Procedure Act, 1877. But it will be remembered that such application had been restricted by the Sonthal Parganas Regulation of 1872 to suits brought for amounts above Rs. 1,000 in Courts established under Act VI of 1871. The combined effect of these provisions must be to make the Civil Procedure Act of 1877 apply in the Sonthal Parganas only to suits so brought.

The next Act is the Civil Procedure Code of 1882. In everything that is material to the present appeal this is identical with the Civil Procedure Code, 1877. It took the place of that Act in the Sonthal Parganas to the extent that such Act was in force therein, that is to say, for suits brought for amounts above Rs. 1,000 in Courts established under Act VI of 1871.

We now come to Regulation V of 1893, the short title of which is the Sonthal Parganas Justice Regulation, 1893. It made important changes in the administration of civil justice in the Sonthal Parganas. By section 5 it added to the two classes of special Courts theretofore existing in the Sonthal Parganas, named the Courts of settlement officers and the Courts of officers appointed by the Lieutenant-Governor of Bengal under section 2 of the Regulation of 1855, a third class, namely, Courts established under Act XII of 1887, known as the Bengal United Provinces and Assam Civil Courts Act, 1887, which is an Act which has taken the place of Act VI of 1871 (which has been repealed), and all references to the last-mentioned Act must now be read as referring to it.

These definite provisions entirely remove the difficulties as to the jurisdiction within the Sonthal Parganas of Courts appointed under the Bengal United Provinces and Assam Civil Courts Act, 1887, or its predecessor, the Bengal Civil Courts Act, 1871. It remains to see what suits are put within the cognizance of these Courts. By section 9 the jurisdiction of a Judge of one of these Courts extends to—

> "Suits of which the value exceeds Rs. 1,000 and which are not excluded from his cognizance by the Sonthal Parganas Settlement Regulation, or by any other law for the time being in force."

Their Lordships are clearly of opinion that these words of exclusion refer to section 5 of the Regulation of 1872, which excluded from the cognizance of any such Court suits relating to land, the settlement of which had not been finished and duly notified, and placed them exclusively in the hands of settlement officers or officers appointed by the Lieutenant-Governor of Bengal under section 2 of the Regulation of 1855. This exclusive jurisdiction is therefore maintained, and suits in regard to land, which is not

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in districts that have been notified as being completely settled, are not within the cognizance of the ordinary Courts, no matter what may be the value of the matter in dispute. It is not necessary for the purpose of this appeal to examine further into the jurisdiction of Courts established under these provisions, because the Court of Bhagalpur, in which the present action was brought, is not one of such Courts.

The result of this examination of the Acts and Regulations applicable to the Sonthal Parganas is that at the date when this suit was commenced no suit could lie in any Court established under Act VI of 1871, or under the Act which has taken its place, namely, the Bengal United Provinces and Assam Civil Courts Act, 1887, in regard to any land or any interest in or arising out of any land, or for the rent or profits of any land, but such suits must have been brought before settlement officers, or Courts of officers appointed by the Lieutenant-Governor of Bengal under section 2 of the Sonthal Parganas Act, 1855, and the Sonthal Parganas Justice Regulation Act, 1893, Part 2, so long as the land had not been settled and the settlement declared by a notification in the Calcutta Gazette to have been completed and concluded, And, further, that whatever be the Court that has jurisdiction to decide cases within the Sonthal Parganas, and is exercising that jurisdiction, it must observe the two rules relating to usury above referred to.

It is necessary therefore to ascertain what was the exact position (so far as settlement is concerned) of the land included in the mortgage bond at the date of the commencement of the action in which the present appeal is brought, namely, June 20th, 1904. The information supplied to their Lordships by the parties, as to the notifications appearing

in the Calcutta Gazette show conclusively that, although portions of the lands mortgaged had been settled, and notification had been duly made that such settlement had been completed, at dates prior to the institution of the suit, other portions were not so settled. It is clear, therefore, that the suit came within the provisions of section 5 of the Sonthal Parganas Settlement Regulation, 1872, relating to the exclusive jurisdiction of officers appointed by the Lieutenant-Governor of Bengal, or by settlement officers, inasmuch as it related to land which had not been settled, or the settlement of which had not been declared by a notification in the Calcutta Gazette to have been completed and concluded. The Court of Bhagalpur had therefore no jurisdiction to entertain the suit, and this appeal must be allowed.

Reliance was placed by counsel for the respondent on the stipulation in the bond that the mortgagees might enforce it in the Court of Bhagalpur. Their Lordships are of opinion that this has no effect. That Court had no jurisdiction to entertain the suit which, beyond question, was a suit in regard to land in the Sonthal Parganas, and that being so the parties could not give it the necessary jurisdiction by consent. To do so would be to nullify the express prohibition of section 5 of the Sonthal Parganas Regulation, 1872, which was binding on any Court having jurisdiction in the Sonthal Parganas in the exercise of such jurisdiction.

Their Lordships are also of opinion that, apart from the question of jurisdiction, any Court dealing with the subject matter of the suit would be bound to give full force and effect to the provisions of section 6 of the Sonthal Parganas Settlement Regulation, 1872, relating to usury, and therefore to have refused to decree any compound interest arising from any

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intermediate adjustment of interest, or an amount of total interest exceeding the principal of the original debt or loan.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, and the action dismissed with costs in both Courts. The respondents must pay the costs of this appeal. The two subsidiary appeals fall with the dismissal of the action and the costs connected with them will form part of the costs of the whole proceedings, which the respondents must bear.

Appeal No. 9 allowed.
Appeals Nos. 10 and 11 dismissed.

Solicitors for appellants in appeal No. 9, and respondents in appeals Nos. 10 and 11: *T. L. Wilson & Co.*

Solicitors for respondents in appeal No. 9, and appellants in appeals Nos. 10 and 11: *Morgan, Price & Co.*

J. V. W.

APPELLATE CIVIL.

Before Jenkins C.J., and N. R. Chatterjea J.

FORBES

v.

SECRETARY OF STATE FOR INDIA.*

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May 21.

Income Tax—Executor's liability to income tax—Suit, maintainability of, for declaration of non-liability to tax—Collector, jurisdiction of, to assess income tax—Income Tax Act (II of 1886)—Contract Act (IX of 1872) s. 72.

Income accruing to an executor under the will of a testator is 'income' as defined in s. 3, clause (5) of the Income Tax Act, 1886, and is liable to be taxed under the Act.

It is the Collector's duty to determine what persons are chargeable in respect of sources of income other than salaries and pensions, profits of companies and interest on securities.

A suit brought by an executor of an estate for a declaration that as executor he was not liable to pay income tax in respect of any income of the estate and that the collector, in realizing the sums paid to him, acted without jurisdiction, and for a decree for the amount so paid with interest, does not lie.

Payment of income tax by the executor of an estate, under protest, on the ground that as executor no tax was payable by him, may be regarded as paid under coercion within the meaning of s. 72 of the Contract Act, *Kanhaya Lal* v. *National Bank of India, Ld.* (1) referred to.

SECOND appeal by A. H. Forbes, the plaintiff.

In the suit which gave rise to this appeal, the plaintiff, Mr. A. H. Forbes, as executor to the estate of

* Appeal from Appellate Decree, No. 1084 of 1912, against the decree of T. C. Mukerjee, District Judge of Purneah, dated Feb. 26, 1912, confirming the decree of Sashi Bhusan Banerjee, Munsif of Purneah, dated July 14, 1911.

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the late Mr. A. T. Forbes, sued the Secretary of State for India in Council for refund of Rs. 814-4-4 realized from him by the Collector of Purneah as income tax assessed under Act II of 1886 in respect of taxable income accruing to the estate. The plaintiff also claimed Rs. 97-4-11 as compensation at 12 per cent. per annum in lieu of interest.

So far back as 1891, the plaintiff as such executor was assessed with income-tax, but the assessment was cancelled by the Commissioner on the 29th April, 1892, on appeal preferred by the plaintiff, and the Commissioner's order was upheld by the Board of Revenue. In November, 1908, the plaintiff was again called upon by the Collector of Purneah to pay Rs. 286 and odd as income tax on taxable income accruing in respect of the said estate. The plaintiff filed an objection, urging that the question as regards his liability as executor to pay the tax had already been finally decided by a competent tribunal and could not be re-opened. The objection was, however, disallowed. There was an appeal to the Commissioner against that order but with like result, and the tax assessed was levied.

The Secretary of State for India in Council in defence contended, *inter alia*, that the suit was not maintainable, that the order of the Commissioner exempting the plaintiff from income tax was incorrect and based on an erroneous interpretation of law, and that the Collector of Purneah and the Commissioner of the Bhagalpur Division were not acting as Judicial Officers when passing orders under Act II of 1886.

The Munsif held the suit to be maintainable, but dismissed the suit, holding that the plaintiff was liable to be assessed with income tax and that the orders of the Collector and Commissioner were not judicial orders.

On appeal, the District Judge upheld the Munsif's judgment.

The plaintiff thereupon filed this Second Appeal.

Babu Mahendra Nath Roy (with him *Babu Jogendra Nath Mukherji*), for the appellant. An executor is not personally liable: see Income Tax Act, ss. 4, 20, 21, 22, 23, 33. A refund is allowed when a testator dies in the midst of a year. Even as a trustee, he was not liable. The practice of the income-tax office on this point is warranted by the Act and is in my favour. From 1821 to 1912, the Board has never realized. The Collector has no jurisdiction to assess income tax. My client is therefore entitled to recover.

The executor may get income not assessable.

Mr. S. P. Sinha (with him *Babu Ram Charan Mitra, the Senior Government Pleader*,) for the respondent.

[JENKINS C. J. Do you wish to say anything on s. 39?.]

Yes. The Collector has jurisdiction to assess on persons chargeable. The only remedy against his action is appeal. If he assesses anything but income, he acts beyond his jurisdiction: *see* section 14. If he assesses the person who derives income, he acts properly. If he says I assess A, though I believe B is chargeable, it is not: *Attorney-General* v. *London County Council* (1), per Lord Macnaghten.

[JENKINS C. J. See *Secretary of State for India* v. *Fahamidannissa Begum* (2)].

Section 39 is a bar to a suit.

[N. CHATTERJEA J. What do you say to *Kameshwar Pershad* v. *The Chairman of the Bhabua Municipality* (3)?]

(1) [1907] A. C. 131, 135. (2) (1889) I. L. R. 17 Calc. 590.
(3) (1900) I. L. R. 27 Calc. 849.

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There it was clearly without jurisdiction. The words are, moreover, different between the provisions of the Income Tax Act and the Bengal Municipal Act.

The Collector shall determine who is chargeable The civil courts have no jurisdiction to determine this. That it is income is assumed in the plaint itself: *see* section 49 of the Income Tax Act. The words are "accruing to a person" and not "belonging to." The Act makes stringent provisions for finality of revenue authorities. No provision of law is to be presumed to be inequitable.

The argument that the Collector has no jurisdiction to find the person chargeable, but has jurisdiction only as regards the amount chargeable, finds no support from the Act. On the contrary, it is said the Collector *shall* determine what persons are chargeable.

Babu Jogendra Nath Mukherji, in reply.

JENKINS C. J. This is a suit brought by Mr. A. H. Forbes who is described as executor to the estate of the late A. J. Forbes, against the Secretary of State for India in Council, and the prayer of the plaint is for a declaration that, as executor to the estate of the late A. J. Forbes, the plaintiff is not liable to pay income tax in respect of any income of the said estate and that the said Collector, in realizing the sums paid to him, acted without jurisdiction, and for a decree for the sum of Rs. 912-3-3 being the amount realized, with interest.

To succeed in this suit it is incumbent on the plaintiff to show that the payment had been made by him under coercion. It is unfortunate that there was no direct issue on that point. Nor has our attention been drawn to any finding of fact as to this; but it

may be assumed for the purposes of this case that there was coercion within the meaning of Section 72 of the Contract Act as interpreted by the Privy Council case in *Kanhaya Lal* v. *National Bank of India, Ld.* (1).

What then is the ground on which this declaration is sought? This has not been made clear to us in the course of the argument.

The case turns upon the Income Tax Act (II of 1886), which is described as "An act for imposing a tax on income derived from sources other than agriculture." The preamble is in these terms, "Whereas it is expedient to impose a tax on income derived from sources other than agriculture; it is hereby enacted as follows." Then there is a definition of *income* as being income and profits accruing and arising or received in British India, and includes, in the case of a British subject within the dominions of a Prince or State in India in alliance with Her Majesty, any salary, annuity, pension or gratuity payable to that subject by the Government or by a local authority established in the exercise of the powers of the Governor-General in Council in that behalf." Chapter II of the Act deals with the liability to tax, and it commences with section 4 which provides that subject to the exceptions mentioned in the next following section, there shall be paid, in the year beginning with the first day of April, 1886, and in each subsequent year, to the credit of the Government of India, or as the Governor-General in Council directs, in respect of the sources of income specified in the first column of the second schedule to this Act, a tax at the rate specified in that behalf in the second column of that schedule." Section 5 provides for certain exceptions and enacts that nothing in section 4 shall render

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liable to the tax the several sources of income there indicated. It is not suggested that the income with which we are now concerned comes within any one of those exceptions. But the argument would appear to be that though that which has been taxed is '*income*', still because the recipient is an executor no tax is payable. There is no provision in the Act which authorises such a view. There is an exemption provided in favour of those whose income does not reach a certain amount: but apart from that there is no personal exemption of which an executor as such could take advantage. Chapter II merely deals with the liability of the subject matter to tax. Chapter III deals with assessment and collection, the natural sequel to the general liability imposed by Chapter II. It deals with *income* under four heads which correspond with the four sources of income set forth in the second schedule to the Act. The first source of income is *salaries* and *pensions*, second—Profits of Companies, third—Interest on Securities, and fourth and last—other sources of income. For the purpose of the argument before us it has been assumed that the income with which we have to deal comes under the last of these four heads. While it is provided with regard to the first three classes of income that the tax shall be deducted or be paid as expressly indicated, the wider class of incomes coming under clause D was not capable of such simple treatment: and so we find it is provided by section 14 that "the Collector shall, from time to time, determine what persons are chargeable under Part IV, and the amount at which every person so chargeable shall be assessed." Apart from that there is no indication within or without the Act of the person who is chargeable in respect of *other sources of income*, and it will be noticed that it is the Collector who shall determine what persons are

chargeable in respect of these *other sources of income*. It may be that there is a limitation placed upon the Collector's decision by the words of section 15 which clearly indicate, as common sense indeed would determine, that the person chargeable is the person to whom the income accrues. All that appears very simple and in this case it has been observed by the Collector, who has come to the conclusion that the subject matter with which he was dealing was *income*, as admittedly it was and so was subject to tax. He further determined that the plaintiff, being the person to whom the income accrued, was the person chargeable under Part IV. In so determining he was exercising a jurisdiction that was clearly vested in him by the Act, and I cannot see how it can be said that he purported to exercise a jurisdiction which he did not possess and so did not make an assessment under the Act.

It has been argued before us that sections 20 to 23 throw a flood of light on the case favourable to the plaintiff. I fail to see it. They deal with a special class of cases and principally of persons who by incapacity arising from some personal defect or non-residence are unable to be approached and dealt with directly, and the sections provide that trustees, guardians, committees, agents and so forth may be dealt with in their places. They further make a special provision for receivers or managers in whom no property vests and also the Court of Wards, Administrators-General and Official Trustees. But if it be argued from this that it affords an indication that income accruing to an executor under the will of a testator is not liable to be taxed, I am of opinion that the argument has no value and no force. I have indicated my views to the effect that this is *income* which is liable to be taxed within the meaning of the

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Act. I have also shown that the Collector has determined that the plaintiff is a person chargeable and that in so doing he acted within the limit of his jurisdiction. That being so, it appears to be a case where, according to section 39, it is right to say that the suit does not lie. It has, therefore, been rightly dismissed by the lower Court, and we dismiss the appeal with costs.

N. R. CHATTERJEA J. I agree.

S. M. *Appeal dismissed.*

CRIMINAL REVISION.

Before Sharfuddin and Teunon JJ.

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May 21.

MANIPUR DEY

v.

BIDHU BHUSHAN SARKAR.*

Public Nuisance—Unlawful obstruction to public way—Bonâ fide question of title—Duty of Magistrate to determine the question—Criminal Procedure Code (Act V of 1898), ss. 133, 137.

Per SHARFUDDIN J. When a party, against whom an order under s. 133 of the Criminal Procedure Code is contemplated, appears and raises the question that a pathway, alleged to have been unlawfully obstructed, is not a public but a private one, the Magistrate should not only decide whether it is public or private, but he should determine whether the claim is *bonâ fide* or a mere pretence set up only to oust the jurisdiction of the Court. If he finds that the claim is a mere pretence, he may proceed to pass a final order ; but if he finds that the claim, though not substantiated, has been raised *bonâ fide*, he should stay his hand and refer the party to the Civil Court, and if the party does not have recourse to such Court

* Criminal Revision No. 595 of 1914, against the order of M. Smither, Sessions Judge of Dacca, dated March 13, 1914.

within a reasonable time, the Magistrate may then proceed to make the order absolute.

Belat Ali v. *Abdur Rahim* (1), *Matukdhari Tewari* v. *Hari Madhab Das* (2), *Luckhee Narain Banerjee* v. *Ram Kumar Mukherjee* (3), and *Preonath Dey* v. *Gobordhone Malo* (4) referred to.

The provisions of s. 133 of the Code should be sparingly used.

TEUNON J., in the circumstances of the case, assented to the order proposed.

ON the 20th June 1913, one Bidhu Bhushan Sarkar filed a petition before the Sub-divisional Magistrate of Manikgunge, in the district of Dacca, alleging that the petitioner had thrown up earth and thereby obstructed a public pathway leading from Dhankoria to Khalli which was used for the passage of horses, cattle and boats. The Magistrate referred the petition to the President of the Dhankoria Union for enquiry and report. The President reported that the disputed way was a public path used for marriage and religious processions, the carriage of corpses and the passage of boats during the rains. The Magistrate thereupon drew up a proceeding under s. 133 of the Criminal Procedure Code calling upon the petitioner to remove the alleged obstruction or show cause why the order should not be set aside. In answer, the petitioner filed a petition stating that the land on which he had raised earth appertained to his homestead and denying the existence of any, and still less a public, pathway. He further submitted that the alleged pathway was not shown as a public *rasta* on the Settlement maps, and that a previous proceeding under s. 133 of the Code had been instituted, through enmity, by a servant of the President against his (the petitioner's) landlord, Dinesh Chunder Roy, in respect of a portion of the same pathway, and had been quashed

(1) (1903) 8 C. W. N. 143.
(2) (1904) 9 C. W. N. 72.
(3) (1888) I. L. R. 15 Calc. 564.
(4) (1897) I. L. R. 25 Calc. 278.

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on the ground that the land belonged to Dinesh and was not public property. On the 13th January 1914, the witness was present and the case was made over to a Subordinate Magistrate for disposal. The latter proceeded to take evidence on both sides, and thereafter made the order absolute under s. 137 of the Code on the 28th February 1914. He held it proved that the disputed strip was waste-land lying between houses and extending beyond the petitioner's house, that the pathway was public, though not used for processions or as a cattle track, that being less than 15 links in width, it was incapable of representation on the Settlement maps and was ordinarily ignored in the *khatians*, and that the previous proceeding related to different land.

A motion against the order was made to the Sessions Judge of Dacca who refused to refer the case by his order, dated the 13th March 1914. The petitioner then moved the High Court and obtained the present Rule.

Mr. P. L. Roy (with him *Babu Ramani Mohan Chatterjee*), for the opposite party. It is true that it has been held that when a *bonâ fide* claim of title is raised, the Magistrate must determine the point first: *Belat Ali* v. *Abdur Rahim* (1), *Matukdhari Tewari* v. *Hari Madhab Das* (2), *Luckhee Narain Banerjee* v. *Ram Kumar Mukherjee* (3), *Preonath Dey* v. *Gobordhone Malo* (4). But the facts found by the Magistrate negative *bonâ fides* by implication. At all events the case should be remanded.

Mr. K. N. Chaudhuri (with him *Babu Upendra Lal Roy*), for the petition. The cases cited establish that the Magistrate was wrong in not deciding

(1) (1903) 8 C. W. N. 143.
(2) (1904) 9 C. W. N. 72.
(3) (1888) I. L. R. 15 Calc. 564.
(4) (1897) I. L. R. 25 Calc. 278.

expressly whether the claim was a *bonâ fide* one or a mere pretence.

Cur. adv. vult.

SHARFUDDIN J. This is a Rule calling upon the District Magistrate of Dacca to show cause why the orders passed under sections 133 and 137 of the Criminal Procedure Code, dated the 28th February 1914, should not be set aside on the ground that having regard to the *bonâ fide* question of title raised, and in the absence of any finding that the objection raised was not *bonâ fide*, the order is without jurisdiction. It appears from the order of the Deputy Magistrate concerned that Manipur Dey, the petitioner before us, on receipt of a notice under section 133 of the Criminal Procedure Code, appeared and alleged that the pathway in question was not a public pathway. The following are the findings of the trying Magistrate with regard to the objection thus raised. "It is contended on behalf of Manipur Dey that the way cannot be called public, if a few neighbours and acquaintances have acquired mere permissive right thereto . . . . . It is idle in the present case to urge that the way is Manipuri's private property, it is waste-land lying between houses and extending beyond Manipuri's house . . . . It is pointed out that the Settlement Department has not recognised the way as a public *rasta*. It is to be remembered that a *rasta*, which is less than 15 links in width, is incapable of representation on the Settlement map, scale 16" to a mile, and is ordinarily ignored in the *khatians*." Section 133 occurs in a Chapter headed "Public Nuisances," and the section itself deals with unlawful obstruction, etc., of any way, etc., used by the public, etc. Sub-section (*2*) of section 133 of the Criminal Procedure Code provides that no

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order duly made by a Magistrate under this section shall be called in question in any Civil Court. From this latter provision it is clear that the provisions of section 133 of the Criminal Procedure Code should be sparingly used. Any order passed under this section cannot be questioned in any Civil Court. It is, therefore, necessary that if the party against whom the order is contemplated to be passed, raises a question that the pathway is not a public property in the sense of the provision of this section, the Magistrate trying the case should be careful not only to decide as to whether the pathway in question is situated on a private land or if it is for public use, but he should, even when the claim of the objector is not substantiated, find whether the claim is *bonâ fide* or it is set up only to oust the jurisdiction of the Court. If the Magistrate finds that the claim which is set up is a mere pretence, he should then proceed to pass a final order and make the Rule issued by him absolute. If, however, he finds that the claim, although not substantiated, is not a mere pretence and is not raised to oust the jurisdiction of the Court, but that it is raised *bonâ fide* he should stay his hand and refer the party to the Civil Court. And if the party, within a reasonable time, does not have recourse to the Civil Court, the Magistrate may then proceed to make the Rule absolute. In the present case the objector, who is the petitioner before us, had contended that the pathway in question was a private property, and that only the neighbours and acquaintances had been using it in a permissive way. The question is whether this contention on the part of the objector is a *bonâ fide* contention or not. From the findings of the lower Court it is clear that the pathway in question is close to the objector's house. It is apparent from the judgment of the lower Court

that the path in question has not been shown as a pathway in the map prepared by the Settlement Department. Regard being had to the above two facts, I think it was necessary for the lower Court to have come to a finding as to whether the claim set up by the objector was a mere pretence or whether it was *bonâ fide*. In this view I am supported by a number of authorities of this Court, viz., the cases of *Belat Ali* v. *Abdur Rahim* (1), *Malukdhari Tewari* v. *Hari Madhab Das* (2), *Luckhee Narain Banerjee* v. *Ram Kumar Mukherjee* (3), and *Preo Nath Dey* v. *Gobordhone Malo* (4).

For the above reasons, I would set aside the order complained against and make the Rule absolute. I would further direct that the lower Court should try the case from the point reached on the 13th January 1914, and dispose it of according to law.

TEUNON J. Having regard to the long series of decisions in which this Court has held that when a person called upon to show cause under section 133 of the Criminal Procedure Code raises a question of title, the trying Magistrate must decide whether that question has been raised in good faith, I am prepared in the present case, without agreeing in all the reasons advanced by my learned colleague, to assent to the order proposed by him.

E. H. M.

Case remanded.

(1) (1903) 8 C. W. N. 143.
(2) (1904) 9 C. W. N. 72.
(3) (1888) I. L. R. 15 Calc. 564.
(4) (1897) I. L. R. 25 Calc. 278.

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

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May 26.

JIBANANDA CHAKRABARTY

v.

KALIDAS MALIK.*

Easement—Prescriptive right to take water by means of definite mode of access—Whether owner of servient tenement may substitute some other means of access.

When the owner of a dominant tenement has acquired a prescriptive right to take water from a tank on the servient tenement, and has for this purpose used a particular means of access for the statutory period, he has acquired a right to reach the water by means of such definite mode of access: the servient owner, at his own discretion, may not substitute for his use some other means of access.

SECOND APPEAL by Jibananda Chakrabarty and others, the defendants.

The facts of this case are briefly as follows. The defendants owned a tank standing on their land. The plaintiffs, who were neighbours residing at some distance towards the east of the tank, had, together with the members of their family, used the water of this tank for more than 20 years and claimed title thereto as an easement. The plaintiffs used to obtain access to the water by a path across the east bank and down a flight of steps on the eastern slope of the bank. In 1908, the defendants re-excavated the tank, repairing the slopes on all sides and built a flight of masonry

* Appeal from Appellate Decree, No. 3840 of 1912, against the decree of Asutosh Banerjee, Subordinate Judge of Burdwan, dated Sept. 2, 1912, affirming the decree of Narayan Chandra Ghosh, Munsif, Burdwan, dated April 8, 1911.

steps on the northern slope. Since then the defendants had prevented the plaintiffs from having access to the water in the accustomed manner. The defendants, however, did not deny that the plaintiffs had acquired a right of easement in the water of the tank, and were agreeable to their using the water by means of a new flight of steps built on the northern slopes. The plaintiffs thereupon filed a suit in the Court of the Munsif of Burdwan for a declaration of their prescriptive right to take water from the tank, for removal of the obstruction erected by the defendants to the exercise of such right, and for an injunction to restrain interference in future. On the 8th April 1911, the learned Munsif decreed the plaintiffs' suit, and on appeal by the defendants the learned Subordinate Judge of Burdwan dismissed their appeal on the 2nd September 1912. The defendants appealed to the High Court.

Babu Bepin Behari Ghose (with him *Babu Ramani Mohan Chatterjee*), for the appellants. I submit that the plaintiff respondent could have acquired no right of easement by taking water from accidental breaks in the embankment of the tank and as all such breaks were filled up after re-excavation of the tank, the plaintiff could not force the defendants (who are the new purchasers of the tank) to open a ghat for the plaintiff. The defendants after purchase repaired all breaches in the embankment of the tank and erected a fence for preventing other people including the plaintiff from opening, "*hanas*" or breaks in the embankment. The plaintiffs instituted criminal proceedings for removal of the fence, and being unsuccessful they instituted the present suit for declaration of their right to draw water from the defendant's tank from a particular "*hana*" to be made. This

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suit must therefore be dismissed, as the right claimed by the defendants cannot be allowed.

Babu Gour Chandra Pal, for the respondents. My contention is that the plaintiffs used to draw water from a particular ghat, and it matters little whether it was a "*hana*' or a regular ghat. They acquired the right to draw water, having done so for over the statutory period, and the defendants on the plea of re-excavating the tank cannot obliterate that ghat. And, further, the erection of the fence by the defendants showed their malicious intention to illegally restrain the plaintiffs from exercising their just rights. Though they were invited to draw water from the masonry ghat on the north bank of the tank yet that proposal cannot take away their right of drawing water from the particular ghat or "*hana*" on the eastern bank. The appeal should, therefore, be dismissed.

Babu Bepin Behari Ghose, in reply.

Cur. ad. vult.

MOOKERJEE AND BEACHCROFT JJ. This is an appeal by the defendants in a suit for declaration of the prescriptive right of the plaintiffs to take water from a tank, for removal of the obstruction erected by the defendants to the exercise of such right, and for an injunction to restrain interference in future. The facts are not in controversy at this stage and may be briefly narrated. The defendants are the owners of a tank which stands on their land. The plaintiffs are neighbours and have their residence at some distance towards the east of the tank. They and the members of their family have, for more than 20 years, peaceably and openly, as of right and without interruption, used the water of the tank, and claiming title thereto as an easement. They used to obtain access to the

water by a path across the east bank and down a flight of steps on the eastern slope of the bank. In 1908, the defendants re-excavated the tank, repaired the slopes on all sides and built a flight of masonry steps on the northern slope. Since then, the defendants have prevented the plaintiffs from access to the water in the accustomed manner by what has been described as the eastern ghat. The defendants, however, do not deny that the plaintiffs have acquired a right of easement in the water of the tank, and they are agreeable to the use of the water by them by means of the new flight of steps built on the northern slope. But the plaintiffs are not satisfied with this and insist on their right to reach the water by what formed the eastern ghat and has now been obliterated by the defendants. The question consequently arises, whether when the owner of a dominant tenement has acquired a prescriptive right to take water from a tank on the servient tenement, and has for this purpose used a particular means of access for the statutory period, he has acquired a right to reach the water by means of such definite mode of access, or, may the servient owner, at his own discretion, substitute for his use some other means of access. No authority directly in point has been placed before us by either the appellants or the respondents in support of their respective contentions. But we are of opinion that on principle the question must be answered in favour of the dominant owner.

It is plain, as was pointed out by Lord Campbell C. J. in *Race* v. *Ward* (1), that water as it issues on excavation of a well or a tank, is not to be considered as produce of the soil, and that a right to enter on land and to take such water may be acquired as an

(1) (1855) 4 E. & B. 702 ; 99 R. R. 702.

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easement: *Manning* v. *Wasdale* (1), *Constable* v. *Nicholson* (2), *Macnaghten* v. *Baird* (3), *Gardner* v. *Hodgson*(4). This right it is obvious, may be analysed into two constituent elements, namely, a right to go on the land of the servient owner and a right to take the water which stands on his land, and so long as it stands there, is his property. The two constituent rights are acquired simultaneously, but each must nevertheless be acquired in conformity with the statute. Now, in so far as a right of way is concerned, it is clear that to establish a private right of way by prescription it is necessary that in going across the land to any particular point or for any particular purpose a particular route must be used. As Morton J. puts it on behalf of the Full Bench in *Hyot* v. *Kennedy* (5), "to establish a way by prescription, the use must be not only open, adverse, uninterrupted, peaceable, continuous, and under a claim of right, but must be confined substantially to the same route and to substantially the same purpose for which the way was designed originally, unless the way is one for all purposes." This is plain, for a way imports of necessity a right of passing along a particular route between certain termini: *Jones* v. *Percival*(6), *Holmes* v. *Seely*(7), *Rogers* v. *Duncan*(8). On this principle it has been ruled that the owner of a private right of way is entitled to enter the way at one and the same place only, and not at any other; for instance, if a way to a field runs by the side of the field, the dominant owner is not entitled to alter the position of the gate through which he has been

(1) (1836) 5 A. & E. 764; 44 R. R. 576.
(2) (1863) 14 C. B. N. S. 230.
(3) [1903] 2 I. R. 731.
(4) [1901] 2 Ch. 148.
(5) (1898) 170 Mass. 54.
(6) (1827) 5 Pick. 485.
(7) (1828) 19 Wendell. 507.
(8) (1890) 18 Can. Sup. Ct. 710.

accustomed to pass from the field to the way and to make a new entrance at a fresh place: *Woodyer* v. *Haddon* (1), *Beridge* v. *Ward*(2), *Marshall* v. *Ullswater S. N. Co.*(3). The rule is based on obvious good sense, for though the servient owner may not object to a person entering his land at a particular spot, for that may not cause him any inconvenience, it may be very much against his inclination, and it may be detrimental to his property that the dominant owner should enter it at any other place. But the position is clearly mutual, and if the right of way has been acquired from one point to another in a particular direction, the servient owner cannot, at his choice, substitute another way between the same points but by a different route, which might be less convenient to the dominant owner. It is for the protection as well of the dominant as of the servient owner that the right acquired should be limited to the part of the area of the servient tenement over which it has been actually exercised: *Clifford* v. *Hoare* (4), *Wood* v. *Stourbridge Ry. Co.* (5), *Strick & Co.* v. *City Officers Co.* (6). To put the matter briefly, the extent of a right acquired by prescription is measured by the extent of the use and enjoyment thereof during the prescriptive period: or, as Lord Watson stated it in *MacIntyre Brothers* v. *McGavin* (7), a prescriptive right to take water in a particular way and at a particular place infers no right to take the supply of water in any other way and at any other place: *Blackburne* v. *Sommers* (8), *Hussain Rowther* v. *Abubakar* (9). We are not here concerned with the

(1) (1813) 5 Taunt. 126, 132.
(2) (1860) 2 Fos. & Fin. 208, affirmed in (1861) 10 C. B. N. S. 400.
(3) (1871) L. R. 7 Q. B. 166.
(4) (1874) L. R. 9 C. P. 362.
(5) (1864) 16 C. B. N. S. 222.
(6) (1906) 22 T. L. R. 667.
(7) [1893] A. C. 268, 277.
(8) (1879) L. R. 5 Ir. 1.
(9) (1909) 20 Mad. L. J. 699.

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question of the alteration of the mode of enjoyment of a right of easement by mutual consent of parties, nor are we called upon to examine the question of the right of the dominant owner to deviate from the way acquired by prescription, when such way has been obstructed by the servient owner himself: *Selby* v. *Nettlefield* (1), *Hawkins* v. *Carbines* (2). The general rule is that when a right of way by a particular track has been acquired by a dominant owner, the servient owner, cannot force upon him, in lieu thereof, a different track, any more than the dominant owner himself can, at his discretion, take recourse to a different path. Tested in the light of this principle, the claim of the plaintiffs is un-answerable. They have proved to the satisfaction of the Courts below, that, for much longer than the statutory period, they have had free access to the water of the tank of the defendants by a track across the eastern bank and by a flight of steps down the eastern slope. The prescriptive right they have acquired has become indefeasible and the defendants were not entitled to improve the tank so as to interrupt and make impossible the exercise of the right of the defendants in the particular mode they had adopted for many years. The position might have been different if the plaintiffs had merely proved that they had appropriated the water of the tank for the statutory period and had failed to show that they had used a definite means of access to reach the water; in such a contingency, while the plaintiffs would have acquired a prescriptive right to use the water, they could not have claimed access to the tank by a particular path; they would have had no ground for complaint so long as the defendants allowed them reasonable facilities of approach to the tank. In the case before us, however,

(1) (1873) L. R. 9 Ch. App. 111, 114. (2) (1857) 27 L. J. Ex. 44.

the plaintiffs, as we have seen, stand in a position of much greater advantage; they have acquired a right to reach the water by a definite path and also a right to use the water. We may add that the conduct of the plaintiffs is really not quite so unreasonable as has been characterised by the defendants. The access to the water of the tank by way of the flight of new masonry steps on the northern slope involves the use of a longer and more circuitous way and what is more important, a loss of privacy, to which so much importance is attached by females in this country. But it is immaterial what motive animates the plaintiffs, for, as Lord Halsbury, L. C. said in *Mayor of Bradford* v. *Pickless*(1), no use of property which would be legal if due to a proper motive, can become illegal, because it is prompted by a motive which is improper or even malicious. We are of opinion that as the plaintiffs have acquired a right, not merely to the use of the water of the tank of the defendants but also to have access to the water in a particular mode, the Court of first instance rightly decreed the suit; and as that decree has been confirmed by the Subordinate Judge, this appeal must be dismissed with costs.

G. S. *Appeal dismissed.*

(1) [1895] A. C. 587.

FULL BENCH.

Before Jenkins C. J., Stephen, Woodroffe, Mookerjee and Holmwood JJ.

1914

June 2.

DAYAMAYI

v.

ANANDA MOHAN ROY CHOWDHURY.*

Occupancy Holding—Transferability of part or whole—Consent of landlord—Operation of transfer as against raiyat, landlord and other persons—Civil Procedure Code (Act XIV of 1882), s. 244.—Bengal Tenancy Act (VIII of 1885) s. 87.

In transfers, for value, of occupancy holdings, *apart from custom or local usage* :

(i) The transfer of the whole or a part is operative against the raiyat,—

(*a*) Where it is made voluntarily ;

(*b*) Where it is made involuntarily and the raiyat with knowledge fails or omits to have the sale set aside.

A sale is made involuntarily, where it is in execution of a money decree, but not of a decree founded on a mortgage or charge voluntarily made.

(ii) The transfer is operative as against the landlord in all cases in which it is operative against the raiyat, provided the landlord has given his previous or subsequent consent. Where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding ; but where the transfer is of a part only of the holding, or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding unless there has been : (*a*) an abandonment within the meaning of s. 87 of the Bengal Tenancy Act, or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy.

Whether there has been a relinquishment or repudiation or not depends on the substantial effect of what has been done in each case.

(iii) The transfer of the whole or a part is operative as against all other persons where it is operative against the raiyat.

* Reference to Full Bench in Appeal from Appellate Order No. 455 of 1907, in Appeal from Appellate Decree No. 2388 of 1908, and in Letters Patent Appeal No. 15 of 1910 in Appeal from Appellate Decree No. 2379 of 1908.

REFERENCES to FULL BENCH.

I. In Appeal from Appellate Order, No. 455 of 1907 (*Dayamayi* v. *Ananda Mohan Roy Chowdhry*), the appellant was the transferee of a portion of a non-transferable occupancy holding. She was the petitioner in the executing Court.

II. In Appeal from Appellate Decree No. 2388 of 1908 (*Shaik Azim* v. *Golak Chung*), the plaintiff, who was the purchaser of a portion of a *jote* from one of the *jotedars*, was the appellant.

III. In Letters Patent Appeal No. 15 of 1910 (*Ambika Charan Mandal* v. *Ram Charan Pramanik*), the appellant was defendant No. 1, who was a co-sharer tenant of a non-transferable occupancy holding which the plaintiffs purchased at a sale held in execution of a money decree.

The material facts of the aforesaid three cases will appear from the Orders of Reference, which were as follows:

I. Appeal from Appellate Order No. 455 of 1907.

This appeal was referred to a Full Bench by the Hon'ble Mr. Justice Coxe and the Hon'ble Mr. Justice Doss, two of the Judges of this Court, with the following opinion:

In this case the respondent No. 2 was the owner of an occupancy holding which was not transferable by local custom or usage. He sold a portion of it to the appellant. The landlord afterwards sued for rent and obtained a decree. In execution he sold the holding and purchased it himself. The appellant then applied under sections 244 and 311 of the Civil Procedure Code and section 173 of the Tenancy Act to have the sale set aside. The lower Appellate Court has decided against the appellant and hence this appeal:

Two points are taken in appeal:

First, That the Sub-Judge was wrong in holding that the appellant was not entitled to maintain the application under sections 311 and 244; and,

Secondly, That he was wrong in holding that the decree-holder's purchase was not proved to have been effected on behalf of the judgment-debtor.

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Taking the second point first, we think that the decision of the Subordinate Judge on this point is one of fact that cannot be questioned in second appeal.

With regard to the first point, the Subordinate Judge has decided the fourth point laid down for decision in his judgment in favour of the appellant. That point is thus stated—"whether the sale notices were suppressed by fraud of the decree-holder". So we may take it as a finding of fact, with which we cannot interfere in second appeal, that the sale was obtained by the decree-holder by fraud. But the Sub-Judge holds that the appellant being a purchaser of a portion of a non-transferable occupancy holding was not entitled to apply under section 244 of the Civil Procedure Code at all.

The question whether the appellant is entitled to apply under section 244 depends on the question whether he is a representative of a party to the suit, which depends on the further question whether he has an interest in the judgment-debtor's property which is affected by the decree. This is laid down in *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar* (1) which has been followed in several of the cases to which we propose to refer. It is clear enough that if the appellant has purchased any interest of the judgment-debtor, that interest is bound by the decree, and the appellant is so far a representative of the judgment-debtor and is entitled to apply under section 244. The question, therefore, narrows itself down to this, namely, whether a person, who purchases without the landlord's consent a portion of an occupancy holding not transferable by local custom or usage without the landlord's consent, can be said to have purchased any interest at all in the property. The Subordinate Judge had relied on *Nissa Bibi* v. *Radha Kishore Manikya* (2). In that case the applicant to set aside the sale was a mortgagee of the holding, and the learned Judges held that his right to have the sale set aside depended on the question whether or not the holding was transferable by local usage. They remarked: "If such interest was not transferable either according to law, custom or local usage, then we are of opinion that the appellant could not rightly be regarded as a representative in the proper sense of the word and as falling within the provisions of section 244, Civil Procedure Code." This finding was necessary for the decision of the case, for by necessary implication in the order of remand the learned Judges directed the Lower Court to dismiss the application if it was found that the holding was not transferable by local usage.

The only distinction that the learned pleader for the appellant can draw between this case and that quoted is, that this is a case of a sale and that was

(1) (1896) I. L. R. 24 Calc. 62. (2) (1906) 11 C. W. N. 312.

one of a mortgage. But a perusal of the decision itself will show that it refers generally to all transfers. We think there is no real distinction between the cases. A sale of the holding for arrears of rent would have been as fatal to a mortgage as to a sale.

We think, therefore, that if this decision is sound we are bound to dismiss the appeal, and to hold that in the present case, in which the holding is not transferable by custom, the appellant obtained nothing by his purchase and cannot be regarded as a representative under section 244, inasmuch as if he bought no interest, he has no interest to be affected by the decree. There is of course authority for the view that a purchase, such as this, conveys nothing. We may refer to *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (1) *Kuldip Singh* v. *Gillanders Arbuthnot & Co.* (2) *Sadagar Sircar* v. *Krishna Chandra Nath* (3).

On the other hand, however, it seems to have been held by necessary implication in *Bhagirath Changa* v. *Hafizuddin*(4), *Ambica Nath Acharjee* v. *Aditya Nath Moitra*(5) and *Ayenuddin Nasya* v. *Srish Chandra Banerji*(6) that a purchaser of an occupancy holding not transferable by local custom or usage acquires a good title against his vendor, and persons claiming through him, and it has been held further in *Kabil Sardar* v. *Chunder Nath Nag Chowdhry* (7), *Durga Prosad Sen* v. *Doula Gazee* (8), *Sheik Gozaffur Hossein* v. *Dublish*(9) that a transfer of a portion of an occupancy holding not transferable by local customs or usage does not entitle the landlord to re-enter on the portion so transferred. In view of these authorities, though they are not expressly referred to, it has been held in *Omar Ali Majhi* v. *Basirudeen Ahmad* (10), following *Kunja Behari Mondal* v. *Sambhu Chandra Roy* (11), to which *Bungshidhar Haldar* v. *Kedar Nath* (12) may be added, that a purchaser of a portion of an occupancy holding, whether transferable or not, is entitled to apply under section 310 A, and therefore, following *Azgar Ali* v. *Asaboddin Kazi* (13), quoted above, under section 244. It has been sought to distinguish the present case from *Omar Ali Majhi* v. *Basiruddin Ahmad* (10), on the ground that the application in the latter case was under section 310 A. The words in both section 310 A and section 311 are "persons whose immoveable property has been sold" and the whole point is whether the purchaser can be said to

(1) (1897) I.L.R. 24 Calc. 355.
(2) (1899) I.L.R. 26 Calc. 615.
(3) (1899) I.L.R. 26 Calc. 937.
(4) (1900) 4 C.W.N. 679.
(5) (1902) 6 C.W.N. 624.
(6) (1906) 11 C.W.N. 76.
(7) (1892) I.L.R. 20 Calc 590.
(8) (1894) 1 C.W.N. 160.
(9) (1896) 1 C.W.N. 162.
(10) (1908) 7 C. L. J. 282.
(11) (1903) 8 C.W.N. 232.
(12) (1896) 1 C.W N. 114.
(13) (1904) 9 C.W.N. 134.

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have any property at all in the holding. In *Azgar Ali* v. *Asaboddin* (1) the application was under section 311 and section 244. We think there is nothing in this distinction, and that if the decisions in *Omar Ali Majhi* v. *Basirudeen Ahmad* (2) and *Azgar Ali* v. *Asaboddin Kazi* (1) are correct, we are bound in the present case to allow the appeal and to hold that the appellant is a person whose immoveable property has been sold and is a representative of the judgment-debtor under section 244.

We think, therefore, that there is a real conflict of authority and that the appeal ought to be referred to a Full Bench and we refer it accordingly. As Rule II of the Rules for References to a Full Bench by implication requires that we should state our own opinion of the point referred, we may say that we agree with the decision in *Omar Ali Majhi* v. *Basirudeen Ahmad* (2), and it necessarily follows that we differ from the view taken in *Nissa Bibi* v. *Radha Kishore Manikya*. (3) We would formulate the point to be decided in the following way:—

"Is a person, who without the landlord's consent purchases from a raiyat the whole or a portion of an accompany holding which is not transferable by local custom or usage, entitled to apply under section 244 of the Civil Procedure Code as a representative of the raiyat to have a sale of the holding in execution of a decree for arrears of rent set aside on the ground of fraud?"

II. Appeal from Appellate Decree No. 2388 of 1908

This Appeal was referred to a Full Bench by the Hon'ble Mr. Justice Chitty and the Hon'ble Mr. Justice N. R. Chatterjea, two of the Judges of this Court, with the following opinion :

This is an appeal by the plaintiff in a suit brought by him to recover possession jointly with defendant No. 44 of certain land. His suit was dismissed by the Munsif, but the Subordinate Judge has given him a decree for one-fourth of his claim, on the ground that he had been recognized as tenant by some of the co-sharer landlords holding a share of 4 annas. As to the facts, it is found that the *jote* in question belonged to Hari Das Mondol and Parasuram Nama Das, two brothers, in equal shares. Defendant Nos. 1 and 2 are the sons of Hari Das. On Parasuram's death, his widow, defendant No. 44, succeeded to his 8 annas share, and sold 7 annas, 15 gundas to the plaintiff on the 25th Asarh 1308 (9th July 1911). Within two years before suit filed, the plaintiff was dispossessed of his portion of the holding by the 12-anna co-sharer landlords, who settled these lands with the defendants Nos. 6, 8 and 12. It appears that defendant No. 44, plaintiff's vendor, and her co-sharers

(1) (1904) 9 C.W.N. 134. (2) (1908) 7 C.L.J. 282.
(3) (1906) 11 C.W.N. 312.

are in possession of the remainder of the holding, and it is not alleged that they had ceased to pay the rent of the entire holding before the ouster of the plaintiff by the 12-anna co-sharer landlords. It was conceded by the learned vakil for the appellant that if the case of *Kuldip Singh* v. *Gillanders, Arbuthnot and Co.*, (1) is to be followed, then his client has no case. That case is a distinct authority for the proposition that the mere fact of a plaintiff having once had possession would not entitle him as against the landlord, to recover possession in a suit not under Section 9 of the Specific Relief Act. As against the landlord, he must show some title. In that case as the transfer to the plaintiff of a portion of the *jote* was not binding on the landlords, he was unable to show a title on which he could claim to be reinstated in possession. That case is on all fours with the present. It was distinguished in the cases of *Benodini Dassi* v. *Peary Mohan Haldar* (2) and *Asgar Ali* v. *Asaboddin Kazi* (3). In each of these cases the Court remarked that had the case of *Kuldip Singh* (1) been directly in point, they would have had to consider whether the matter ought not to be referred to a Full Bench. The same remark was made in the case of *Rai Kamaleswari Persad Singh Bahadur* v. *Maharaja Harbullabh Narain Singh Bahadur* (4). *Kuldip Singh's Case* (1) was again distinguished, but without any note of dissent, in *Ashok Bhuiyan* v. *Karim Bepari* (5). In that case the Court pointed out that *Kuldip Singh's Case* (1) is no authority for the proposition, that a purchaser of a portion only of a *jote* gets no title at all. It was again distinguished in the case of *Gour Kaibarta* v. *Srimati Tarajan Bibi* (6), where the plaintiff sued not the landlord but other tenants. On the other hand, we find that *Kuldip Singh's Case* (1) was followed in the case of *Manada Sundari Dasi* v. *Madhu Sudan Das* (7), one of the Judges being a member of the Bench in both cases. We cannot find that *Kuldip Singh's Case* (1) has ever been overruled. At the same time it is questionable whether the principle upon which it proceeds is entirely consistent with the principle on which the cases of *Kabil Sardar* v. *Chunder Nath Nag Chowdhry* (8), *Durga Prosad Sen* v. *Doula Gazee* (9), *Sheik Gozaffur Hossein* v. *Dablish* (10) and *Rai Kamaleswari Persad Singh Bahadur* v. *Maharaja Harbullabh Narain Singh Bahadur* (4) are based. These cases appear to rest upon the principle that where an occupancy ryot transfers a portion of his holding but remains in possession of the remainder and pays rent for the entire holding, the

(1) (1899) I. L. R. 26 Calc. 615.
(2) (1903) 8 C. W. N. 55.
(3) 1904) 9 C. W. N. 134.
(4) (1905) 2 C. L. J. 369.
(5) (1905) 9 C. W N. 843.
(6) (1908) 8 C. L. J 161.
(7) (1901) A. A. D. No. 528 of 1901.
(8) (1892) I. L. R. 20 Calc. 590.
(9) (1894) 1 C. W. N. 160.
(10) (1896) 1 C. W. N. 162.

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tenancy still subsists and there is no abandonment of the entire holding, which alone can entitle the landlord to eject the transferee.

If *Kuldip Singh's Case* (1) was correctly decided it follows that so long as the transferee of a portion of a holding can remain in possession, he can shelter himself under the title of his transferer, the occupancy raiyat and the landlord cannot evict him by process of law. If, however, the landlord can, by any means, prevent his getting into possession, or, when he has got into possession, can oust him by force, the transferee has no remedy at law by suit against the landlord. This is no doubt somewhat of an anomaly, and puts a premium upon violence, the landlord being tempted to take the law into his own hands. *Kuldip Singh's Case* (1) is perhaps indirectly supported by the decision in the recent case of *Agarjan Bibi* v. *Panaulla* (2).

As serious doubts have been cast on the correctness of the decision in *Kuldip Singh's Case* (1) and as the questions raised are of very great importance, we would refer, for decision by a Full Bench, the question—whether in the case of a transfer of a portion of an occupancy holding, such transfer not binding the landlord unless made with his consent, the transferee can by suit recover possession from the landlord who has forcibly dispossessed him.

III. Letters Patent Appeal No. 15 of 1910.

This appeal was referred to a Full Bench by the Hon'ble Sir Lawrence Hugh Jenkins, Kt., Chief Justice, and the Hon'ble Mr. Justice N. Chatterjea, one of the Judges of this Court, with the following opinion :

The plaintiffs sued to recover possession of an occupancy holding alleging that they had purchased the same at a sale held in execution of a money decree against one Kristo Das. The defence was that Kristo Das had no title to the lands, that the holding being non-transferable no right passed to the plaintiffs, and that the suit was not maintainable as one Narain, the nephew of Kristo Das, who had a share in the holding, had not been made a party. The Court of first instance held that only a four annas share of the holding belonged to Kristo Das, four annas to Narain, and the remaining 8 annas share belonged to the contesting defendants Nos. 1. and 2 ; that the holding not being transferable nothing passed to the plaintiffs at the sale, and that the suit was bad for non-joinder of Narain, and dismissed the suit. On appeal, the lower Appellate Court held that the suit could not be dismissed for non-joinder of Narain, but that he would not be bound by the decree, and that defendants Nos. 1 and 2, who were Kristo Das's co-sharers in the holding, could not raise the question of transferability of the holding, and gave a decree to the plaintiffs for joint

(1) (1899) I. L. R. 26 Calc. 615. (2) (1910) I. L. R. 37 Calc. 687.

possession in respect of a four annas share of the lands. That decree having been confirmed on second appeal by Mr. Justice Digambar Chatterjee, the present appeal has been preferred by the defendants Nos. 1 and 2 under the Letters Patent against his judgment. It appears that Kristo Das, whose interest was purchased by the plaintiffs, did not contest the plaintiffs' claim. The landlord of the holding brought a suit for arrears of rent against the defendants Nos. 1 and 2 and Narain and so far has not recognised the plaintiffs as tenants and is no party to the suit.

The point for consideration in this appeal is whether the question of transferability of Kristo Das's share in the holding can be raised by the defendants Nos. 1 and 2, and this depends upon the question whether a right of occupancy, not transferable by custom or local usage, is a right that is merely personal to the raiyat and as such cannot be transferred at all, or is a right the transfer of which is valid against all persons other than the landlord, so that no one except the landlord can take exception to the validity of the purchaser's title. There is a considerable conflict of judicial opinion on the point.

Before the Bengal Tenancy Act was passed, it was settled by a Full Bench in the case of *Narendra Narayan Roy* v. *Ishan Chandra Sen* (1) that a right of occupancy was a right that was personal to the raiyat and could not be transferred. The question there arose between the landlord and the transferee. Subsequent to the passing of the Bengal Tenancy Act, in the case of *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2), the learned Judges after a consideration of the provisions of the Bengal Tenancy Act came to the same conclusion, and it was held in that case that the tenant whose occupancy holding had been sold in execution of a money decree could himself raise the question that the holding was not transferable in a suit by the purchaser for possession of the holding, and that the tenant was not barred by the provisions of section 244, Civil Procedure Code. *Bhiram Ali's Case* (2) was followed, in a number of cases where such a question was raised by the tenant, with this qualification that if the tenant was aware of the execution proceedings and having had opportunity of objecting did not object, he was precluded by the provisions of section 244, Civil Procedure Code, from raising the question subsequently. The case of *Durga Charan Mondal* v *Kali Prasanna Sarkar* (3) may be cited as an instance of this class of cases.

In the case of *Agarjan Bibi* v. *Panaulla* (4) a suit for possession by the purchaser of a share of an occupancy holding was resisted not by the

(1) (1874) 13 B. L. R. 274; 22 W. R. 22.
(2) (1897) I. L. R. 24 Calc. 355.
(3) (1899) I. L. R. 26 Calc. 727.
(4) (1910) I. L. R. 37 Calc. 687.

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tenant who had transferred his share but by his co-sharers, and it was held that it was open to tenants in occupation of a portion of the *jote*, *i.e.*, the co-sharers of the vendor, to question the validity of the transfer.

A different view has been taken in other cases, *viz*, that the question of transferability is one that might be raised by the landlord, but cannot legitimately be raised by trespassers, and that whatever might be the precise nature of the tenant's interest which is purchased, it has a market value and the transfer is capable of being recognised by the landlord, and that the purchaser is entitled to be protected in the enjoyment of his purchase against all the world except possibly his landlord—see *Basarat Mandal* v. *Sabulla Mandal* (1)—or in other words, as observed in the case of *Haridas Bairagi* v. *Udoy Chandra Das* (2) the transfer of an occupancy holding is not a void transaction, and is voidable only at the option of the landlord. And in several cases, for instance in *Ayenuddin Naiya* v. *Srish Chandra Banerji* (3), it has been held that in a suit between two rival claimants, (both of whom derive their title from the tenant) neither of whom is the original tenant nor the landlord, the question of transferability does not arise. These cases, however, can be explained by the doctrine of estoppel.

A sale of occupancy holding has been held to be valid if settlement is made by the landlord with the auction-purchaser as soon as can reasonably be expected after the sale—see *Dwarkanath Pal* v. *Tarini Sankar Ray* (4)—and an objection to the sale of a holding with the consent of some of the landlords was overruled in the case of *Shakaruddin Choudry* v. *Rani Hemangini Dasi* (5), on the ground that the non-consenting landlords might give their consent after the sale is held, but that the decree-holders must take the risk and the purchaser must purchase at his peril.

In the case of a voluntary transfer it has been held that the transferer cannot question the validity of the transfer—see *Bhagirath Chunga* v. *Hafizuddin* (6), but such cases proceed on the ground that the transferer is estopped from impugning the validity of his own transfer.

If the view that the transfer of an occupancy holding is valid against all persons excepting the landlord, is correct, it is difficult to see how the raiyat himself, whose right is sold at an execution sale, can question the validity of the purchaser's title, or why the validity of the transfer should depend upon recognition by the landlord in cases where the landlord does not impugn the transfer. If, on the other hand, occupancy holdings are not transferable at all, there does not seem to be any reason why persons in the position of the defendants in the present case, or even trespassers in

(1) (1898) 2 C.W.N. cclxxix.
(2) (1908) 12 C.W.N. 1086.
(3) (1906) 11 C.W.N. 76.
(4) (1907) I.L.R. 34 Calc. 199.
(5) (1911) 16 C.W.N. 420.
(6) (1900) 4 C.W.N. 679.

possession of the land, should not be entitled to question the validity of the transfer, or why the purchaser should acquire a right of occupancy by consent of the landlord although he might by virtue of fresh settlement become a non-occupancy raiyat.

The facts of the present case are similar to those of *Agarjan Bibi* v. *Panaulla* (1), referred to above, except that in that case the purchase was made by a *kabala* which, however, does not make any difference in principle, (the doctrine of estoppel not coming into operation either in that case or in the present) ; but having regard to the conflict of views noticed above and having regard to the great importance of the questions involved, we think the case should be referred to a Full Bench.

The questions referred to the Full Bench are :

(*i*) Whether a right of occupancy which is not transferable by custom or local usage is a right which can be transferred at all.

(*ii*) If not, whether the holding apart from the right of occupancy can be transferred.

(*iii*) In either case whether the validity of the transfer can be questioned by any person other than the landlord of the holding.

As these questions arise in a second appeal the whole case is referred to the Full Bench.

Babu Mahendra Nath Roy (with him *Babu Sarat Chandra Ghose*), for the appellant in Appeal from Order, No. 455 of 1907. The original application for setting aside the sale was both under s. 244 and s. 311 of the Code of 1882. But I shall take it that the Reference is limited to s. 244, as this is a second appeal. A second appeal will not lie under s. 311.

The precise point which arises is, whether I can come in under section 244, clause (*c*) of the Code of 1882. The rent decree under which the holding was to be sold was subsequent to my purchase, and it could not be disputed—quite apart from the question whether I had acquired any interest in the holding—that if I had any interest at all, that interest would be bound by the decree. The sale passed the holding and not merely the right, title and interest of the judgment-debtor. Assuming then that I had acquired an

(1) (1910) I.L.R. 37 Calc. 687.

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interest which was in the nature of property, I would come within the ruling of the Full Bench in *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar*(1).

[*Dr. Ghose.* That was a suit on a mortgage.]

In that case, the purchase was after the decree, but the essence of the rule which their Lordships lay down is that the words "legal representative" means a purchaser of a judgment-debtor's interest, who, so far as the interest is concerned, is bound by the decree.

There are cases where purchaser of a holding or of a portion has been held entitled to come in under s. 244.

Then comes the most important question in the case whether the purchaser of a share of an occupancy holding acquires any interest in the holding. If he does not, there is an end of the matter. The cases appear to go to this extent that a purchaser of a holding which is not transferable by custom acquires an interest in the holding which is not good as against the landlord, but which may be good and is often good against others.

[*Dr. Ghose.* Here you are asserting your title against the landlord].

Some of these cases proceed on the principle of estoppel, viz., that the tenant (transferor) cannot deny the title of the purchaser (transferee) and if the transferor cannot deny, persons claiming under him cannot deny, and a person may acquire title by estoppel. It is an interest or estate in property which is no doubt defeasible, but all the same it is an interest in the nature of property. Some cases have gone further and held quite independently of the question of estoppel that the purchaser does acquire an interest which is good against strangers, although not against the landlord.

(1) (1896) I. L. R. 24 Calc. 62, 71.

There are on the other hand some cases which are against us and which proceed on the principle that an occupancy holding is as a rule, unless there is a custom, not transferable.

[JENKINS C.J. By "occupancy holding," you mean a holding in respect of which there is an occupancy right?]

Yes. The principle of the last mentioned class of cases is that the vendor cannot pass any title to the purchaser, though no doubt he may be estopped in certain circumstances.

It would be purely academic to go into the question of transferability in the earlier days. The earlier authorities appear to lay down that unless there was a custom, the right of occupancy is not transferable.

[MOOKERJEE J. Have you been able to trace any instance in the early authorities where the question was raised except as between the landlord and the tenant or his transferee?]

The Fifth Report in one place deals with this point. I have not found the precise question discussed in any of the early reports.

The question will now have to be decided with reference to the present law.

There are reported cases in which the status of a person who has purchased a portion or the whole of an occupancy holding to come in under s. 244 has been considered apart from the question whether the holding is transferable or not.

[JENKINS C. J. See *Kunja Behari Mondal* v. *Sambhu Chandra Roy* (1).]

I had better go first to *Azgar Ali* v. *Asaboddin Kazi* (2). In this case a person who had purchased a portion of an occupancy holding was held to be a representative of the judgment-debtor, the original

(1) (1903) 8 C. W. N. 232. (2) (1904) 9 C. W. N. 134, 136.

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tenant, in respect of execution of a decree for rent against the judgment-debtor, within the meaning of s. 244. No question was raised as to whether the holding was transferable by custom or not. Of course I take it no holding would be ordinarily transferable, except by custom. The case decided a pure question of law.

[MOOKERJEE J. The case was argued on the assumption that the holding was non-transferable.]

Where a decision of a question like this relates to the transfer of an occupancy holding, unless it is shown that the fact of transferability would affect the decision of the question as one of law, I take it the fact would be immaterial.

Azgar Ali's Case (1) has been followed in two other cases: *Gopi Nath Chattopadhya* v. *Sajani Kanta Singh* (2) and *Haradhan Rakhit* v. *Girish Chandra Mukerjee* (3).

[*Dr. Ghose.* -The case was doubted in *Makhan Lal Pal* v. *Khudu Khan* (4)].

[JENKINS C. J. Do not these cases establish that a person may be a representative, though his purchase was prior to the decree in execution of which the sale took place?]

Yes, and that a purchaser of a part of the holding is a representative of the judgment-debtor. *Makhan Lal's Case* (4) was decided by Maclean C. J. and Geidt J. on the 3rd April 1906. *Gopi Nath's Case* (2) was decided by the same judges only some three months before the other, *i.e.*, on the 15th December 1905.

[MOOKERJEE J. Is not there another case by Ghose and Pargiter JJ. where the question arose, whether a purchaser *before* decree was a representative?]

(1) (1904) 9 C. W. N. 134.
(2) (1905) 10 C. W. N. 240.
(3) (1908) 13 C. W. N. 98, 99-
4) (1906) 10 C. W. N. clxiii.

Yes, *Surendra Narain Singh* v. *Gopi Sundari Dasi* (1).

Nissa Bibi v. *Radha Kishore Manikya* (2) is against me. The question was whether a person to whom an occupancy holding was mortgaged before its sale in execution of a decree for rent was a representative of the judgment-debtor within the meaning of s. 244. Their Lordships said the question would depend on the question whether the holding was transferable or not. It was a mortgage of the entire holding. In that judgment they refer to *Azgar Ali's Case* (3), as also the Full Bench case of *Ishan Chunder Sirkar* (4).

The same view is taken by Brett and Chitty JJ. in *Prosunno Kumar Middar* v. *Bama Churn Mondal* (5).

[MOOKERJEE J. That also was a case of purchaser of an entire holding?]

Yes.

[*Dr. Ghose.* There is a later case—*Nalini Behary Ray* v. *Fulmani Dasi* (6)]

There are other cases which refer to the *locum standum* of a puchaser of the whole or part of a holding under the provisions of the law, besides s. 244, Civil Procedure Code, *e.g.*, s. 170 of the Bengal Tenancy Act: *Nalini Behari Ray* v. *Fulmani Dasi* (6). This was a case of a transferee of an occupancy holding which was not transferable by custom, who applied under s. 170. The transferee was a purchaser of the entire holding. This case is also an authority for the proposition that if a person has an interest in the property sold which is defeasible by the sale, he is

(1) (1905) I. L. R. 32 Calc. 1031.
(2) (1906) 11 C. W. N. 312.
(3) (1904) 9 C. W. N. 134.
(4) (1896) I. L. R. 24 Calc. 62.
(5) (1909) 13 C. W. N. 652.
(6) (1912) 16 C. W. N. 421, 422.

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a representative of the judgment-debtor within the meaning of section 244, Civil Procedure Code.

Another class of cases coming under section 310A of the Code may be referred to: *Kunja Behari Mondal* v. *Sambhu Chandra Roy* (1). The question was whether the purchaser of a portion of an occupancy holding would be a "person whose immoveable property has been sold." These cases have a bearing on the present question as the question is whether or not a purchaser acquires any interest in the property. The question whether the holding was transferable or non-transferable does not appear to have been raised in that case. The sale which was sought to be set aside was a sale in execution of a rent-decree. Even assuming it was a case of a transfer of a holding which was transferable by custom, the purchaser of a portion would not acquire any interest which the landlord was bound to recognize. Yet the purchaser was held entitled to come in under s. 310 A.

There is an earlier decision of *Benodini Dassi* v. *Peary Mohan Halder* (2), but there the occupancy holding was assumed to be transferable.

Upon the last mentioned two cases, Mitra and Caspersz JJ. decided *Omar Ali Majhi* v. *Basirudeen Ahmad* (3). That was, however, the case of a purchase of a share of a non-transferable holding, and was a case precisely in point. It was in my favour.

There is another case—a quite recent one—in which it was held by Mookerjee and Beachcroft JJ. that a transferee of a portion of a non-transferable occupancy holding could come in under O. XXI, r. 90 of the Code, where the words are "whose interest is affected by the sale:" *Abdul Aziz* v. *Tafajuddin Sheikh* (4.)

(1) (1903) 8 C. W. N. 232.
(2) (1903) 8 C. W. N. 55.
(3) (1908) 7 C. L. J. 282, 283.
(4) (1914) 18 C. W. N. lxxii.

Dealing now with the fundamental question, viz., whether by the transfer of a portion of a non-transferable occupancy holding by the tenant, the transferee may be said to acquire any interest in the nature of property, I shall cite some cases. One class of these cases hold that such a purchaser does acquire an interest in the holding as property. The other class held, quite independently of the question whether the transferee acquires any interest or not, that so far as the vendor is concerned, he cannot question the title of the transferee: This latter class also may be called cases of Title by Estoppel.

Of cases in the first class, see *Basarat Mandal* v. *Sabulla Mandal* (1) decided by Amir Ali and Pratt JJ. This was a purchase of an entire non-transferable holding of an occupancy raiyat, and the question was whether the question of non-transferability or transferability could be raised as against the transferee by a third party and not the landlord. This was the case which was considered by your Lordship the Chief Justice in *Agarjan Bibi* v. *Panaulla* (2). It appears to me to be a suit for recovery of possession on declaration of title by purchase. It was not a suit in which possession was sought to be recovered on the strength of title.

Another case of this class was *Samiruddin Munshi* v. *Benga Sheikh* (3), decided by Sharfuddin and Coxe JJ. This was a suit for recovery of possession after declaration of plaintiff's title by purchase of a holding which was apparently non-transferable. The defendant contended that the holding being non-transferable, the plaintiff had acquired nothing at the sale in execution of a money decree.

(1) (1898) 2 C. W. N. cclxxix. (2) (1910) I. L. R. 37 Calc. 687.
(3) (1909) 13 C. W. N. 630.

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I may also refer to *Ambica Nath Acharjee* v. *Aditya Nath Moitra* (1) where Rampini and Gupta JJ. differed and Maclean C. J. heard as the third Judge.

[JENKINS C. J. That is a Land Acquisition case.]

Yes, but the principle was discussed there. The purchaser claimed the surplus sale-proceeds.

In *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2), the right of a purchaser to resist execution of decree against the tenant is discussed. There the question arose in connection with a defence that was put in by questioning whether the title of the plaintiff who had purchased at a sale in execution of a money decree has or has not the right of occupancy, as it was not saleable by custom. It was a sale of the entire holding. That case was rather summarily decided. The only question decided was that in the absence of custom or usage to the contrary, a raiyati holding, in which the raiyat had only a right of occupancy, is not saleable at the instance of the occupancy raiyat on any condition other than the landlord's seeking to obtain satisfaction of his decree for arrears of rent.

As to the estoppel cases, the earliest is *Bhagirath Changa* v. *Hafizuddin* (3). There the tenant transferor challenged the right of the purchaser, and it was held that he was estopped. This case is important as holding that a title or an estate may sometimes be acquired by estoppel, however imperfect or defeasible that may be. An interest may thus be acquired, by estoppel, in the nature of property.

No doubt these cases take a narrow view of the rights of the transferee, but even then they support the proposition that the purchaser acquires some interest like property, property that no doubt might

(1) (1902) 6 C. W. N. 624. (2) (1897) I. L. R. 24 Calc. 355.
(3) (1900) 4 C. W. N. 679.

be extinguished under some circumstances, but which still is a right of property. Suppose I have come into possession, my vendor cannot turn me out.

The other cases are: *Ayenuddin Nasya* v. *Srish Chandra Banerji* (1), *Hari Das Bairagi* v. *Udoy Chandra Das Bairagi* (2), *Haro Chandra Podder* v. *Umesh Chandra Bhattachariee* (3).

In *Agarjan Bibi* v. *Panaulla* (4) it was held, I take it, that a right of occupancy is non-transferable as a rule, but is subject to some qualifications.

In order to assail the position taken up by me, one must go the length of saying that the transfer of an occupancy holding, even of the entire holding, will not pass any title, and it cannot be perfected even by the consent of the landlord. The logical consequence of such a contention will be that ratification by the landlord would be of no value even in transfers of entire holdings. A settlement by the landlord would amount to a new contract.

The status of a transferee of an occupancy holding is not altogether unrecognized in the Bengal Tenancy Act. *Vide* section 73.

[*Dr. Ghose.* That section refers to transfer sanctioned by custom.]

The Act as a whole does not help us much in elucidating the point in dispute.

As regards transfer of a part see s. 88. The difference between a transfer of an entire holding and the transfer of a part can affect only the landlord.

See also s. 178, sub-s. 3(*d*) and s. 183, illus. (*l*). The former section relates to control of contracting parties. The latter saves custom generally. The illustration throws some light.

(1) (1906) 11 C. W. N. 76.
(2) (1908) 12 C. W. N. 1086.
(3) (1909) 14 C. W. N. 71.
(4) (1910) I. L. R. 37 Calc. 687.

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The omission of any provision in the Bengal Tenancy Act as regards recognition of transfer of a portion need not necessarily affect the question.

Jawadul's Case (1) was subsequently affirmed by the Full Bench in *Ram Mohan Pal* v. *Sheikh Kachu* (2) which was decided under s. 22 before amendment. It was distinguished in *Girish Chandra Chowdhry* v. *Kedar Chandra Roy* (3).

At any rate, the distinction between the transfer of the holding and the right would not be material. I would say I took a part of the holding and a part of the occupancy right attached with it.

Sadagar Sircar's Case (4) is against me.

[STEPHEN J. So is *Nalini Behary Ray* v. *Fulmani Dasi* (5).]

The judgment in *Sadagar Sircar's Case* (4) is not a reasoned one and the claim was through the landlord by the defendants.

Dr. Rashbehary Ghose (with him *Babu Mohini Mohan Chakrabarti* and *Babu Gopal Chandra Das*), for the respondent. You cannot separate a right of occupancy from the holding to which it is attached, if I may say so. This has always been the law in this country.

In *Agarjan Bibi* v. *Panaulla* (6), your Lordships have discussed all important cases. There your Lordships refer to *Narendra Narayan Roy* v. *Ishan Chandra Sen* (7) in which Couch C. J. points out that right of occupancy is not property. Harington in his Analysis, Vol. III, p. 450 holds the same view. Phear J. in *Sohodwa* v. *Smith*(8) says it is rather in

(1) (1896) I. L. R. 24 Calc. 143.
(2) (1905) I. L. R. 32 Calc. 386.
(3) (1899) I. L. R. 27 Calc. 473.
(4) (1899) I. L. R. 26 Calc. 937
(5) (1912) 16 C. W. N. 421.
(6) (1910) I. L. R. 37 Calc. 687.
(7) (1874) 13 B. L. R. 274 ; 22 W. R. 22.
(8) (1873) 12 B. L. R. 82 ; 20 W. R. 139.

the nature of a servitude. Another judgment of the same Judge is *Bootee Singh* v. *Moorut Singh* (1). The leading case on the point is *Hyat Bebee* v. *Akbar Alee* (2).

Other cases cited in *Agarjan Bibi's Case* (3) then read and commented on.

In *Jawadul Huq's Case* (4), which was decided by a Special Bench, judgment was delivered by Macpherson J. (The judgment was read.) There they were dealing with a particular section of the old Tenancy Act which merely says that the occupancy right shall cease to exist, and not that the purchaser shall take nothing. The sub-section cannot be held to mean the holding ceases to exist by the transfer. That section has now been amended. The case is clearly distinguishable.

In *Girish Chandra Chowdhry* v. *Kedar Chandra Roy*(5) Macpherson J. modified his previous view. See Babu Dwarkanath Chakrabarti's arguments in that case.

I remember to have argued before O'Kinealy J., sitting singly, that an occupancy right is separable from the holding and that on transfer, the tenancy does not cease, but the occupancy right ceases. I won the case. In Letters Patent Appeal, that judgment was reversed.

S. 73 of the Bengal Tenancy Act cited by my learned friend relates to transferable holdings.

Although the cases reported on this topic number more than two hundred, there are none in which the right of occupancy is separable from the holding to which it is attached.

(1) (1873) 20 W. R. 478.
(2) (1855) S. D A. 20.
(3) (1910) I. L. R. 37 Calc. 687.
(4) (1896) I. L. R. 24 Calc. 143.
(5) (1899) I. L. R. 27 Calc. 473.

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In *Uday Chandra Das Bairagi* v. *Hari Das Bairagi* (1), which was a Letters Patent Appeal against the judgment of Doss J. (2), your Lordships asked, while the case was being argued, whether it was possible to separate the right from the holding.

I rely on the absence of any authority to show that the right cannot be severed from the holding. If you could sever, no landlord would be able to recover possession in such cases.

In the Full Bench case of *Narendra Narayan Roy* (3), it was argued by Babu Gopallal Mitra that mere transfer cannot act as forfeiture of the tenant's right. The basis of the judgment in that case is that the tenant acquires a privileged right by payment for 12 years. He gets a right personally. It is one right and you cannot divide it. The purchaser cannot be heard to say that though he is not an occupancy right, he has a non-occupancy right and so cannot be evicted as a trespasser.

[WOODROFFE J. Do you say that a landlord can ratify transfer of a part?]

No. It is, however, not necessary for us to go so far.

[MOOKERJEE J. At the time *Narendra Narayan's Case* (3) was decided, a right of occupancy could be acquired by 12 years' occupation only. It is different now. A settled raiyat can now acquire the right by shorter occupation.]

All the same, it is a right given by Statute. In *Hyat Bibee* v. *Akbar Alee* (4), you will find what the state of things was from 1793 downwards.

In this country, the relationship between a landlord and a tenant is not always contractual. An

(1) (1909) 13 C. W. N. 937
(2) (1908) 12 C. W. N. 1086.
(3) (1874) 13 B. L. R. 274; 22 W. R. 22.
(4) (1855) S. D. A. 20.

English lawyer may be surprised to find that a tenancy may be unassignable. But here that is the presumption, at any rate, in regard to agricultural holdings: *Prosonno Koomar Tagore* v. *Rammohun Doss* (1).

There may be a transfer shorn of the occupancy right and the transferee can resist the landlord from ejecting him. But he cannot have the occupancy right.

There was a provision in the permanent settlement for the keeping out of undesirable tenants.

My learned friend was bold enough to say for his client that not only he had purchased the holding, but that he was an occupancy raiyat, not in regard to the entire holding, but as regards the lands comprised in the portion sold to him.

The position of a purchaser of the whole holding is not the same as that of the purchaser of a portion.

In *Kuldip Singh* v. *Gillanders Arbuthnot & Co.* (2), transfer of a portion is discussed.

[JENKINS C. J. Can you seriously contend that the judgment is based on s. 88?]

In spirit only. Then there is *Bhiram Ali's Case*(3). Here my learned friend's client is seeking to assert his right against the landlord, my client.

Against his vendor, he would have a perfectly good title, on the ground of estoppel. The transferor cannot have a right to claim license. As a matter of fact, the right is sold and the transferor walks out.

Where the whole of the land has been transferred, the landlord has a right to re-enter.

Taking the view of license put by your Lordships, the licensee cannot be held to be the representative. The appellant would be entitled to apply for setting aside the sale.

(1) (1855) S. D. A. 14. (2) (1899) I. L. R. 26 Calc. 615.

(3) (1897) I. L. R. 24 Calc. 355.

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[MOOKERJEE J. How can he do so, if the transferor has no right to transfer? That begs the whole question.]

In any case, I would not be entitled to eject him.

[MOOKERJEE J. Is their any substance in the contention that s. 244 does not apply? In that case, he may bring a regular suit. Why can we not treat the application under section 244 as a plaint?]

[JENKINS C. J. This is eminently a case that should come under section 244. *Azgar Ali's Case* (1) establishes that the transferee is a representative.]

Yes. But there are cases the other way. If you follow *Azgar Ali's Case* (1), it would mean a reversal of a host of cases. The transferee need not run away from the land; he may pay rent in the name of the original tenant.

It was never the purchaser's case that he was a licensee. It was not so in any case.

Joy Kishen's Case (2) has, I may say, been overruled. The raiyat is bound to cultivate the land himself, unless he sublets as provided by the Bengal Tenancy Act. In this case I have to sue the tenant for rent. The tenant cannot, at this stage, put forward the plea of license: see *Nalini Behary Ray* v. *Fulmani Dasi* (3), *Prosunno Kumar Middar* v. *Bama Churn Mondal* (4), and *Nissa Bibi* v. *Radha Kishore Manikya* (5) on the meaning of the word "representative."

Babu Sarat Chandra Ghose, in reply. When a landlord recognizes, it must be a recognition of the old right. The suit for rent is collusive.

Babu Tara Kishore Chowdhry (with him *Babu Jyotish Chandra Sarkar* and *Babu Sasanka Jiban*

(1) (1904) 9 C. W. N. 134.
(2) (1866) 5 W. R. 147.
(3) (1912) 16 C. W. N. 421.
(4) (1909) 13 C. W. N. 652.
(5) (1906) 11 C. W. N. 312.

Roy), for the appellant in appeal from appellate decree, No. 2388 of 1908. My first submission is that right of occupancy, as contemplated by the Bengal Tenancy Act, is property; and as such it is transferable, although it may not be binding on the landlord except under certain conditions. The right under the Bengal Tenancy Act is different from the right conferred by the earlier law, *i.e.*, Bengal Act VIII of 1869.

[JENKINS C.J. Do you assume that the right became transferable by the Act of 1885?]

Yes.

[MOOKERJEE J. Are you conceding that before 1885, it was not transferable?]

Yes, I concede it for arguments' sake. That was the view of the Full Bench case of *Narendra Narayan*(1). It is not necessary for me to go behind that for my present purposes, though no doubt that is an arguable point.

We find from the Preamble and Schedule I of the Bengal Tenancy Act that the Act expressly amends previous Acts relating to the law of landlord and tenant. I shall go through the Acts which are amended and the rulings under them and show that they do not apply now.

Bengal Act VIII of 1869, s. 6, which is exactly the same as s. 6 of Act X of 1859, not only gives the mode and acquisition, but also the extent and duration of the right. The second paragraph of the section contains an exception, *i.e.*, cultivation by a raiyat as successor will be regarded as cultivation by the raiyat.

S. 22 of Beng. Act VIII, of 1869, corresponding to s. 21 of the Act of 1859, deals with the liability of raiyat to be ejected only for certain reasons. This section qualifies s. 6 to some extent. Look at the proviso. Protection of the tenant was secured better.

(1) (1874) 13 B. L. R. 274; 22 W. R. 22.

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A raiyat can be ejected only by a suit: *vide* s. 52 of the Act of 1869, which corresponds to s. 78 of the Act of 1859. This section appeals to rights of occupancy. As regards other sorts of tenants: see the next section, *viz.*, s. 53.

The position of an occupancy raiyat under the old law came to be considered in the Full Bench case of *Narendra Narayan Roy* (1). The question in that case was whether the mere fact that the original raiyat, the transferor, had a right of occupancy would confer on the transferee such a right by occupation and cultivation for 12 years. The right was held to be in the man so long he cultivated and paid rent.

Chandrabati Koer v. *Harrington* (2) was a case under the Bengal Act of 1869, and the Privy Council there held the same view as the Full Bench case cited above. This is a case under the Bengal Tenancy Act and you are not fettered by the Privy Council decision.

As regards abandonment, there is no dispute in this case.

The Bengal Tenancy Act defines a "tenant," and the expression includes all classes of tenants. See s. 3, cls. (3), (7), (8) and (9) and ss. 4 and 5. S. 5 points out the difference between a 'tenure-holder' and a 'raiyat.' In defining 'tenure-holder' the "right to hold land" etc., includes also succession in interest and not merely those who inherit. In defining a 'raiyat' almost the same words are used. The rights of the two classes of tenants are the same; only the purpose of tenancy is different. If the one is property, the other also is: see clause (4) of the section which must help us in doubt as to the class of tenant. The

(1) (1874) 13 B. L. R. 274; 22 W. R. 22.

(2) (1891) I. L. R. 18 Calc. 349, 353.

distinction is fine. It cannot be said on a perusal of the section that the one is a personal right and the other is property. We should further notice that a raiyat can cultivate with the "aid of partners." That shows that the raiyat can create rights in favour of strangers, remaining himself liable for the landlord's demand. I submit, therefore that so far as partial transfers are concerned, it is implied in the very definition in the Act. This is far in advance of the provisions of s. 6 of the Bengal Act of 1869. As regards the landlord, only the man who first enters is the tenant. But by the provisions of the Act of 1885, members of the family are provided for. These members, though not tenants, are recognized as somebody.

[JENKINS C.J. Do you then say, hired servants would also be recognized as raiyats?]

No. A raiyat has a higher interest. But he is no trespasser and cannot he turned out of the land.

[JENKINS C.J. Do you say partners would be so recognized?]

Yes, to a certain extent.

[MOOKERJEE J. The words on which you rely were introduced to meet the difficulty which had arisen under s. 6 of Beng. Act VIII of 1869, which said that the cultivation must be by the raiyat himself.]

See *Chunder Kishore Dey* v. *Raj Kishore Mozumder* (1).

[MOOKERJEE J. The partner is a partner in cultivation; he can have no interest in the holding.]

May be. It is not necessary to follow it in that way. When the raiyati interest ceases, no one has any interest whatsoever. My contention is that a raiyat may introduce partners and may sublet or

(1) (1888) I. L. R. 15 Calc. 450.

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create partnership with another, as in the case of stock in trade.

An ordinary raiyat now-a-days is in no way inferior to an occupancy raiyat under the older Acts. See s. 44 of the Bengal Tenancy Act and compare clause *(a)* of that section with s. 66 of the same Act. Even a non-occupancy raiyat has a right in the property. An occupancy raiyat has superior rights.

The words "members of family" did not occur in the older Acts.

I shall now deal with the sections dealing with occupancy raiyats in the Bengal Tenancy Act.

Section 19.

[JENKINS C. J. Does not that section only speak of continuation of old incidents? Look at the marginal note.]

Perhaps. But it does not exclude the excidents of the right under the old and the new Acts being essentially different. And were it only a continuation of old rights, it would not have been necessary to provide specifically like this. The section conferred new rights. The section was introduced to give the right to persons who had the right under the old Act.

[MOOKERJEE J. It may be, this was put in only to meet a possible argument that the right being a statutory right ceased on the repeal of the old Act.]

Then section 20 speaks of holding different lands. This is a progress upon s. 86 of the Bengal Act. Note particularly clauses (*2*), (*4*) and (*5*).

[JENKINS C. J. But is it not an introduction of the *khudkast* system under the old Act?]

Might be.

[JENKINS C. J. See *Forbes* v. *Ram Lall Biswas* (1).]

(1) (1874) 22 W. R. 51.

S. 20 refers only to the acquisition of the rights. There is nothing there as to the nature of the right after acquisition. That is to be gathered from other sections.

S. 26 cuts at the foundation of the Full Bench case of *Narendra Narayan Roy* (1). Under s. 26, it is property. Naturally, the power to dispose it of goes with it. The introduction of the word 'intestate,' shows that testamentary disposition is assumed. It is not expressly given, of course. But it naturally follows, because it is property. How is this right to bequeath acquired, if it is not property?

[MOOKERJEE J. But see section 178, clause (*3*) (*d*). Was not s. 26 introduced in view of s. 178?]

S. 178 does not refer to occupancy raiyats. See the next clause.

[STEPHEN J. Do you say there is no difference between an occupancy right and ordinary property? Can the right be attached in execution?]

S. 73 introduces a restriction. Otherwise it is like other property.

S. 65 speaks of a "first charge."

[JENKINS C.J. That is after decree.]

But no distinction is made between any sort of tenancy in such respects. The case of an occupancy raiyat has not been separately provided for. By contract, occupancy right may be made non-transferable. There is no provision of law preventing such a contract. Custom yet governs the law in this matter in many places.

[HOLMWOOD J. It has been suggested that clause (*i*) was added to section 6 of the Transfer of Property Act to explain s. 117 of that Act.]

The words also occur in s. 117 of the Bengal Tenancy Act, though in a different way.

(1) (1874) 13 B. L. R. 274 ; 22 W. R., 22.

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I shall now show other sections, where the right of property is assumed.

In ss. 159 and 160, an "occupancy right" is placed in the same category as a tenure.

[HOLMWOOD J. But by clause (*e*) a non-occupancy right is also protected in some cases.]

[JENKINS C.J. Is the right protected by cl. (*f*) property ?]

It is an incident attached to property. It is not property. The primary clause is (*d*); and (*e*) and (*f*) are subordinate to it.

Unless it is said that all these sections relate to non-transferable right, occupancy right must be property. There is nothing anywhere of non-transferability. Why should we assume it ?

S. 168 speaks of the Local Government's power to direct that occupancy holding be dealt with as tenures. No difference is made there between a tenure and an occupancy right. Sections as regards transfer deal equally in the same way with occupancy rights and tenures.

[JENKINS C.J. Would you extend your theory to non-occupancy rights ?]

It is not necessary for me to consider their case.

S. 85 deals with sub-letting. That section does not give legislative authority to create sub-leases. It only recognises or assumes the right. No argument can, therefore, be drawn against transferability from the absence of any express provision giving the right.

[JENKINS C. J. Is there any express provision as to lease by a tenure-holder ?]

See s. 11. There is provision for transfer. This is also an old right re-enacted.

[MOOKERJEE J. Why was no power to transfer expressly given to raiyats, as is done in the case of tenure-holders in s. 11 ?]

That was exactly the argument in *Bhiram Ali's Case* (1): I am trying to meet that judgment.

The right to sublet existed always, so did the right to transfer in regard to permanent tenures. In the Act of 1885, the right of subletting is not expressly given, but the other right is so given. One reason that might be suggested for this difference is that the transfer or subletting of occupancy rights would not affect the relation of landlord and tenant. This was an Act restricted to landlord and tenant. Another reason might have been that the legislature might have been unwilling to rouse the landlords to active hostility by an express provision. The legislature in an unmistakeable way describes occupancy rights as property. It is for the Courts to work out incidents consistent with the clear intention of the legislature.

S. 85 indicates that a *raiyat* may create rights in favour of strangers, though this may not be binding on the landlord.

While on this matter, see the cases of *Bipin Behari Hati* v. *Amrita Lal Bhattacharji* (2), *Tamijuddi* v. *Asgar Howladar* (3), *Abdul Karim Patwari* v. *Abdul Rahaman* (4) and section 136, cl. (5) and s. 137.

S. 22 contemplates an ordinary case of merger. The idea is consistent only with the idea of property. There is no mention here, as in s. 23, of custom. The operation of the section is not to be limited only to cases of custom.

Ss. 84 and 85 contemplate transfer of part of a holding and of passing of interest from one to another.

There is nothing in ss. 72 and 73 to indicate that these refer not to ordinary cases coming under the Act, but to cases outside the Act where there is a custom. Custom is always saved by s. 183.

(1) (1897) I. L. R. 24 Calc. 355.
(2) (1908) 9 C. L. J. 76.
(3) (1908) I. L. R. 36 Calc. 256.
(4) (1911) 16 C. W. N. 618.

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S. 178, cl. (3) (*d*), which is relied on to show that an occupancy right is not transferable, does not refer to occupancy holdings. It speaks only of "holdings."

Provisions in the Act in which there is no reference to custom should not be construed to imply custom by reference to s. 183. The illustrations to s. 183, which are said to go against me, do not refer to transferability or otherwise.

The earliest case on partial transfers is *Kabil Sardar* v. *Chunder Nath Nag Chowdhry* (1). Where there is no abandonment, the landlord has no right to enter.

The latest case is *Jogendra Nath Sircar* v. *Tincowri Bhattacharya* (2).

I do not know why the principle of estoppel (of the vendor) would not be applicable.

The person dispossessed can sue for recovery. The person who is entitled to the right has brought in another. A trespasser cannot oust him, even though he be the landlord. The plaintiff has been in possession for a number of years. Mere possession has been held not to be sufficient for a title suit. There is a conflict of authorities on this point in this Court. The important cases are: *Khajah Enaetoollah Chowdhry* v. *Kishen Soondur Surma* (3), *Mohabeer Pershad Singh* v. *Mohabeer Singh* (4), *Wise* v. *Ameerunnissa* (5), *Ertaza Hossein* v. *Bany Mistry* (6), *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti* (7), *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar* (8), *Narayana Row* v. *Dharmachar* (9), *Krishna Aiyar* v. *Secretary of State for India* (10),

(1) (1892) I. L. R. 20 Calc. 590.
(2) (1909) 10 C. L. J. 147.
(3) (1867) 8 W. R. 386.
(4) (1881) I. L. R. 7 Calc. 591.
(5) (1879) L. R. 7 I. A. 73, 80.
(6) (1882) I. L. R. 9 Calc. 130.
(7) (1882) I. L. R. 6 Bom. 215.
(8) (1884) I. L. R. 8 Bom. 371.
(9) (1902) I. L. R. 26 Mad. 514.
(10) (1909) I. L. R. 33 Mad. 173.

Sengoda Goundan v. *Varadappan* (1), *Wali Ahmad Khan* v. *Ajudhia Kandu* (2), *Ismail Ariff* v. *Mahomed Ghous* (3). You will find from the above-mentioned cases that all the other High Courts are in my favour. In the Calcutta High Court also, with exception of *Ertaza's Case* (4), all cases are in my favour. Anterior possession of itself establishes a good title to possession: *Sundar* v. *Parbati* (5), *Purmeshur Chowdhry* v. *Brijo Lall Chawdhry* (6), *Nisa Chand Gaita* v. *Kanchiram Bagani* (7). The last mentioned case holds a contrary view, but is inconsistent with Privy Council cases cited above.

[MOOKERJEE J. What do you say to the two illustrations given at the end of Banerjee J.'s judgment (3).]

It is against the moral sense of mankind.

[JENKINS C. J. See *Doe* v. *Dyeball* (8), which says that earlier possession prevails.]

As for the illustration in Banerji J.'s judgment, the question was whether the defendant was right in dispossessing a man in peaceful possession.

[JENKINS C. J. Banerji J. speaks of "mere possession." Do you say he means to exclude cases where a man is inducted into land by one entitled to do so?]

The most recent cases on title originating in possession are *Banka Behary Christian* v. *Raj Chandra Pal* (9) and *Shyama Charan Ray* v. *Surya Kanta Acharya* (10).

[JENKINS C. J. It is not a suit in ejectment, but is one for possession.]

(1) (1911) I. L. R. 36 Mad. 148.
(2) (1891) I. L. R. 13 All. 537.
(3) (1893) I. L. R. 20 Calc. 834; L. R. 20 I. A. 99.
(4) (1882) I. L. R. 9 Calc. 130.
(5) (1889) I. L. R. 12 All. 51; L. R. 16 I. A. 186.
(6) (1889) I. L. R. 17 Calc. 256.
(7) (1899) I. L. R. 26 Calc. 579.
(8) (1829) Moo. & M. 346.
(9) (1909) 14 C. W. N. 141.
(10) (1910) 15 C. W. N. 163.

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Yes. *Kuldip's Case* (1) has not been rightly decided, See O. XXI r. 12 C. P. C.

Babu Gobinda Chandra Dey Roy, for the respondents. I contend that the judgment in *Kuldip's Case*(1) is sound law and has never been really doubted.

[MOOKERJEE J. On the contrary, it has only once been followed.]

It is said the judgment has been doubted in *Benodini Dassi* v. *Peary Mohan Haldar* (2), *Azgar Ali* v. *Asaboddin Kazi* (3) and *Rai Kamaleswari Persad Singh Bahadur* v. *Maharaja Harbullabh Narain Singh Bahadur* (4). In reality, the case was not doubted, but only distinguished. If they had doubted, a reference to Full Bench would have been compulsory. It has been put in the head-note of the last-mentioned case that *Kuldip's Case* (1) was doubted, but that is incorrect.

Occupancy rights are never transferable. It was so under the old Act and is under the present Act. It is a limited right and is of a peculiar nature. It is a personal right. I rely on *Bhiram Ali's Case* (5), which said that even under the Bengal Tenancy Act, the right is personal.

It is certain that the Act of 1885 shows some progress over the older Acts, but the Act does not make the right transferable. Such an important right, if given, would have been provided for in express terms. The chronic indebtedness of the peasantry is an element for consideration.

[MOOKERJEE J. See clause (7) of s. 20.]

Only the sections which create or recognize the right should be looked at to determine what the

(1) (1899) I. L. R. 26 Calc. 615.
(2) (1903) 8 C. W. N. 55.
(3) (1904) 9 C. W. N. 134.
(4) (1905) 2 C. L. J. 369.
(5) (1897) I. L. R. 24 Calc. 355.

intention of the Legislature was: see s. 5, clauses (*1*) and (*2*).

A raiyat must be a tenant: *Narendra Narayan Roy* v. *Ishan Chandra Sen* (1), per Phear J. He pointed out that the words "as a raiyat" has a meaning. A transferee does not hold under the landlord or tenure-holders.

Sections 20 and 21 of the Bengal Tenancy Act may be said to correspond to section 6 of the Bengal Act of 1869. In section 20, we have the definition of a "settled raiyat" for the first time. Clause (*2*) removed doubts as to whether the land held must be the same land. In the old Act it was only said "who holds the land." Clause (*3*) is not new. Clause (*4*) confers no new right, though there was no such clause in the old Act. It only elucidates the question of the position of heirs. Clause (*5*) creates a new right in favour of the tenant. Clause (*6*) is a new concession. Clause (*7*) creates a new presumption in favour of the tenant.

It is clear therefore that whenever a new right has been given to a raiyat, it has been given expressly by statute.

The words "as a raiyat" in s. 21 are very important and significant.

The Act is silent on the question of transferability. These two sections by themselves clearly leave the matter, without doubt, where it was, as laid down in *Narendra Narayan's Case* (1).

S. 4 speaks of three classes of raiyats.

[JENKINS C.J. What is the meaning of the distinction drawn in s. 5 between a "tenure-holder" and a "raiyat"? In the case of a "tenure-holder" it is spoken of as a right derived from some one. It is not

(1) (1874) 13 B. L. R. 274; 22 W. R. 22.

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so said of a raiyat. May not one be a raiyat without being a tenant?]

[MOOKERJEE J. Was not the question discussed in *Binad Lal Pakrashi's Case* (1)?]

Yes.

[JENKINS C. J. You say a raiyat must derive his right from some one? Are all raiyats tenants under the Bengal Tenancy Act?]

But the Bengal Tenancy Act is not a complete code, and the definitions are not exhaustive.

See ss. 11, 12, 15, 17 and 18, where rights of tenure-holders and persons who have a similar status (*e.g.* those holding at fixed rates) are mentioned. There certain rights are expressly given. Section 17 contemplates transfer of a portion. It is an express provision, in certain cases subject to limitations.

Section 26. The use of the word "intestate" in that section has given occasion to the contention that a will is permissible. That cannot be so. Succession to heirs (so far it does not interfere with custom) is expressly given.

[MOOKERJEE J. The words are "as other immoveable property" and not "like other immoveable property." What is the inference?]

In s. 11, right of succession is clearly given.

[MOOKERJEE J. That is only about registration in the landlord's sherista. You cannot infer from the absence of express provision of testacy that it is not allowed. It is well known that s. 26 was inserted in view of a doubt thrown by Sir Barnes Peacock on the point.]

The exact point was before Doss J. (sitting singly) in *Hari Das Bairagi* v. *Udoy Chandra Das Bairagi*(2).

S. 178, clause (*d*) is the only section where the word "bequeath" is used as regards a raiyat.

(1) (1893) I. L. R. 20 Calc. 708. (2) (1908) 12 C. W. N. 1086.

I contend that in s. 26, the Legislators were only considering what would happen if an occupancy raiyat has heirs. The section says nothing generally. The right of testacy cannot be implied. In the Letters Patent Appeal in the case, *Uday Chandra Das Bairagi* v. *Hari Das Bairagi* (1), the point was left open.

[MOOKERJEE J. It has been recently decided in *Amulya* v. *Tarini* (2) that an occupancy right cannot be bequeathed unless by custom.]

That supports my view.

S. 19 preserved existing rights. But my learned friend contends that under the new Act, the right is transferable. There is thus an inconsistency, and an anomaly would be created if my learned friend's argument be upheld. You must either say it is transferable or non-transferable. There cannot be anything intermediate by implication. It is certainly a right very much short of a proprietary right.

[HOLMWOOD J. It is not a continuation of old rights, but a declaration of a new right altogether. There are no two classes of raiyats as you say.]

But the marginal note speaks of continuance of existing rights. See s. 19.

Under the old Act, a landlord or tenant had the freedom to contract in violation of status. The new Act takes away the right. It cannot therefore be said that the new Act has always favoured tenants and extended their rights: see s. 7 of the old Act and s. 178 of the present Act. Then again, under the old Act an occupancy right might be acquired in homestead lands.

S. 22 is another important section. It speaks of transfer and, by implication, of the doctrine of merger.

(1) (1909) 13 C. W. N. 937.

(2) (1914) I. L. R. 42 Calc. 254; 18 C. W. N. 1290.

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The true aspect is it is a transfer to a landlord. That presents no difficulty, as a landlord may not and need not impugn a transfer to himself. It has been held that this section refers only to transferable holdings, *i.e.*, transferable by custom: *Girish Chandra Chowdhry* v. *Kedar Chandra Roy* (1). This case has been followed in some other cases.

S. 65 does not really give any indication of transferability. It is a section for the benefit of the landlord. A holding is always transferable with the consent of the landlord. As a matter of fact mortgages are not uncommon. But it has been held that a mortgage is not a transfer proper. Certainly it is not a complete transfer. The mortgagee remains in possession only.

[JENKINS C.J. The real question is abandonment. That is a question of fact.]

That is so.

[MOOKERJEE J. In usufructuary mortgages, there may be abandonment.]

Yes. S. 18A is a new section and favours my contention.

[MOOKERJEE J. That section applies to tenures only. See the heading of the Chapter.]

It is a general provision in favour of the landlord.

[MOOKERJEE J. How does that section help you?]

The section presumes that transferability is not an incident of such tenancies.

Ss. 85 and 136, cl. (5) were referred to by my learned friend. But the right to sublet does not necessarily imply right of property. When this limited right is expressly given by statute, why was not the general right so given?

See Transfer of Property Act, s. 6, cl. (*i*). Why was this clause introduced?

(1) (1899) I. L. R. 27 Calc. 473.

[MOOKERJEE J. Clause (*i*) is very differently worded from cl. (*a*) to (*h*). These deal with one class of cases, (*i*) with another.]

[STEPHEN J. It should have been a sub-section instead of a clause.]

Yes, but I am entitled to construe it as it is. It recognizes the existing state of law.

Bengal Tenancy Act, s. 160. The mere introduction of certain words like "interest" cannot indicate that it was the intention of the legislature to confer a substantive right. The law as laid down in *Bhiram Ali's Case* (1) and *Agarjan Bibi's Case* (2), is correct and consistent with the law as laid down in all the earlier cases, *e.g.*, *Sohodwa* v. *Smith* (3), and *Narendra Narayan Roy* v. *Ishan Chandra Sen* (4). There are several other cases. There is practically no conflict on this point, though the latest cases may have gone further than the oldest cases and the intermediate cases may have minor differences. The referring Judges have not doubted the cases just cited. They say, these cases have been doubted by others. But they have not been doubted. In *Rai Kameleswari Persad Singh Bahadur* v. *Maharaja Harbullabh Narain Singh Bahadur* (5), extreme cases were made by the respective parties.

[MOOKERJEE J. Do you maintain (apart from authorities) that if a portion is transferred and there is no abandonment, the landlord is entitled to eject the transferee?]

Yes. Of course *Bhiram Ali's Case* (1) goes against it.

(1) (1897) I. L. R. 24 Calc. 355.
(2) (1910) I. L. R. 37 Calc. 687.
(3) (1873) 12 B L. R. 82; 20 W. R. 139.
(4) (1874) 13 B. L. R. 274; 22 W. R. 22.
(5) (1905) 2 C. L. J. 369.

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[MOOKERJEE J. That view was not accepted by Phear J. even?]

Yes, but I go further.

[MOOKERJEE, J. Can you show any cases, where the case of *Narendra Narayan Roy* (1) has been followed and your contention upheld?]

No. But I say that except by fiction, the transfer of a portion must be regarded as a violation of rights. You cannot say the original tenancy continues. Suppose the tenant transfers the bulk of his holding and the tenancy practically disappears. It is difficult to draw a line. Take the other way. The transferee may be an undesirable man and defy the landlord by such a fiction. Take the case of *Agarjan Bibi* (2).

[JENKINS C. J. But that case is somewhat different. The rights of co-sharers are disputed there.]

Yes, but the case discussed the broader question. It is, I say, a personal right.

It would be absurd to hold that the whole cannot be transferred, but a part can be.

[MOOKERJEE J. Where is the absurdity?]

The incident of non-transferability is as much an incident of the whole, as of the part. By transfer of a part, a stranger whom the landlord may not like, may be inducted into the land.

[MOOKERJEE J. But the Act contemplates the case of cultivation by partners, hired labourers, etc.]

But is the landlord entitled only to rent and nothing else? The ultimate reversion is to the landlord. Can he not look to the nature of his tenants?

[JENKINS C. J. Which is the earliest reported case allowing partial transfer?]

(1) (1874) 13 B. L. R. 274; 22 W. R. 22.

(2) (1910) I. L. R. 37 Calc. 687

Kabil Sardar v. *Chunder Nath Nag Chowdhry* (1), *Durga Prosad Sen* v. *Doula Gazee* (2), *Sheik Gozaffur Hossein* v. *Dablish* (3).

[MOOKERJEE J. See *Bootee Singh* v. *Moorut Singh* (4), per Phear J.]

That question as to how far a zamindar can interfere with a raiyat's right may be discussed when *Kabil Sardar's Case* (1) is before the Full Bench. The landlord may run the risk of having a tenant without means.

[MOOKERJEE J. Do you suggest that the landlord should keep constant watch as to who is coming into the land?]

The rent is not secure unless it continues to be within the means of the old tenant to pay. Why will a partial transferee care to pay, if he knows he cannot be touched? Why should landlords be driven to a suit?

[MOOKERJEE J. The transferee can be touched. The holding may be sold by the landlord in execution of a decree against the old tenant. Rent is a first charge.]

But that means a suit.

My next point is the question of earlier possession. Possessory suits are amply provided for in section 9 of the Specific Relief Act: *Wise* v. *Ameerunnissa Khatoon*(5). The law laid down in *Khaja Enaetoollah Chowdhry* v. *Kishen Soondur Surma* (6), *per* Mitter J. is no longer good law. The balance of authority in this Court is in favour of my contention. The decisions of all other High Courts seem to be different, but in all such cases the facts are different.

(1) (1892) I. L. R., 20 Calc. 590.
(2) (1894) 1 C. W. N. 160.
(3) (1896) 1 C. W. N. 162.
(4) (1873) 20 W. R. 478.
(5) (1879) L. R. 7 I. A. 73.
(6) (1867) 8 W. R. 386.

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[MOOKERJEE J. The Privy Council Judgment has not been understood in the way that you do, even in this Court, and the decisions are consistent, except in one instance.]

[JENKINS C. J. Do you think Sir Charles Sargeant's reading of *Wise* v. *Ameerunnissa Khatoon* (1) misconceived (2) ?]

See *Kuldip Singh* v. *Gillanders Arbuthnot & Co.* (3).

[MOOKERJEE J. Not only earlier possession, but also subsistence of the tenancy must be taken into consideration. In the case last cited by you, if the landlord instead of taking the law into his own hands, had brought the suit against the transferee, would he have succeeded ?.]

But if you take that view, you do not consider all the phases of possession. A Civil Court will not punish for trespass.

[JENKINS C.J. By "title" do you mean title to possession ?].

That would depend on the facts of the case. I want the land. It is never put in the way that I am entitled to possession.

[JENKINS C.J. To be more accurate, you have a *zemindari* interest. Does the raiyati interest determine as soon as the *zemindari* interest is let in ?]

But I am not at all bound to recognize any one under s. 88 of the Bengal Tenancy Act.

[MOOKERJEE J. But can the landlord re-enter ?]

I must say in view of *Kabil Sardar's Case* (4) that I am not entitled to do so.

[MOOKERJEE J. But why do you limit yourself to *Kabil Sardar's Case* (4) ?]

(1) (1879) L. R. 7 I. A. 73.
(2) (1884) I. L. R. 8 Bom. 371, 373.
(3) (1899) I. L. R. 26 Calc. 615.
(4) (1892) I. L. R. 20 Calc. 590.

I say it is wrong. I should have the right to re-enter in such cases. The Court does not always enquire into the title to possession, as in adverse possession and in possessory suits.

[JENKINS C. J. The provisions of s. 9 of the present Specific Relief Act is first to be found in the old Limitation Act of 1859. The history of it shows it to be a reproduction of one of the old Roman procedure.]

Kawa Manji v. *Khowaz Nussio* (1).

[MOOKERJEE J. Was not that case disapproved in *Ertaza Hossein* v. *Bany Mistry* (2) ?]

Precisely the same view was adopted in *Nisa Chand Gaita* v. *Karchiram Bagani* (3).

[JENKINS C. J. Is *Kawa Manji's Case* (1) in your favour ?]

I rely on the dissenting judgment and advance it as my argument. What I contend is that after the introduction of s. 9 by the legislature, there is such a right to proceeed on possession. But where the plaintiff bases his claim on title, title has to be looked to.

[JENKINS C. J. The object of that section is to prevent forcible dispossession in any case. It not only protects a person who has a title to possession, but also one who has no such title. Do you say that the transferee can sue the landlord ?].

No.

[MOOKERJEE J. If neither party proves title, why should not the man who has earlier possession succeed ?]

Why should not then the later possessor be respected ?

(1) (1879) 5 C. L. R. 278. (2) (1882) I. L. R. 9 Calc. 130
(3) (1899) I. L. R. 26 Calc. 579.

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[JENKINS C. J. Because it is an invasion of legal right.]

If the transferee's possession is legal possession, the remedy is by way of action in Specific Relief.

[MOOKERJEE J. There is an earlier decision of the Privy Council in *Joykishen Mookerjee* v. *The Collector of East Burdwan* (1) which is against you. Mitter J. in *Enaetoollah's Case* (2) refers to this.]

But *Khajah Enaetoollah's Case* (2) has been dissented from. Your Lordships have to see the effect of *Wise's Case* (3) as followed in *Ertaza Hossein* v. *Bany Mistry* (4), *Purmeshur Chowdhry* v. *Brijo Lall Chowdhry* (5), *Mustapha Saheb* v. *Santha Pillai* (6), and *Shama Churn Roy* v. *Abdul Kabeer* (7).

[MOOKERJEE J. *Purmeshur Chowdhry's Case* (5) is of no help. *Wise's Case* (3) comes between the two Privy Council cases of *Joykishen Mookerjee* (1) and *Sundar* v. *Parbati* (8). What then is the effect of *Wise's Case* (3)? We have to proceed on principles.]

I rely on Banerjee J.'s interpretation of *Wise's Case* (3) and on *Kuldip Singh's Case* (9). My case is also one where the plaintiff was out of possession. Where possession is decreed, title is presumed.

[JENKINS C. J. What is the title in *Sundari's Case* (8)?]

[MOOKERJEE J. In *Ashok Bhuiyan* v. *Karim Bepari* (10), *Kuldip's Case* (9) was followed it is true. But there the case was on all fours with *Kuldip's Case* (9).]

(1) (1864) 10 Moo. I. A. 16.
(2) (1867) 8 W. R. 386.
(3) (1879) L. R. 7 I. A. 73.
(4) (1882) I. L. R. 9 Calc. 130.
(5) (1889) I. L. R. 17 Calc. 256.
(6) (1899) I. L. R. 23 Mad. 179.
(7) (1898) 3 C. W. N. 158.
(8) (1889) I. L. R. 12 All. 51; L. R. 16 I. A. 186.
(9) (1899) I. L. R. 26 Calc. 615.
(10) (1905) 9 C. W. N. 843.

I have contended that *Kuldip's Case* (1) has never been doubted. The referring Judges say that the facts of the present case and *Kuldip's Case* (1) are exactly the same.

[MOOKERJEE J. Has *Kuldip's Case*(1) been followed anywhere ?]

The principle has been adopted in *Agarjan Bibi* v. *Panaulla* (2). See also *Gour Kaibarta* v. *Srimati Tarajan Bibi* (3).

Babu Bipin Chandra Mullick, for the appellant, in Letters Patent Appeal No. 15 of 1910, submitted his arguments under three heads: (*i*) that the right of occupancy is a personal right; (*ii*) that a holding in which a raiyat has acquired occupancy right cannot be transferred apart from the occupancy right; (*iii*) that the validity of transfer can be questioned by any person unless estopped.

On the first point, I submit that before the Bengal Tenancy Act, the right could not be transferred unless allowed by custom or usage, and that the Bengal Tenancy Act has made no change in this respect. Under ss. 178 and 183, occupancy holdings can be bequeathed by custom and usage. That in itself shows that it cannot be transferred otherwise.

[MOOKERJEE J. Is there any reported case before the passing of the Bengal Tenancy Act, where the point was raised, except as between the landlord and tenant ?]

No.

The whole tenour of the Act shows it to be a personal right. The expression 'successors in interest' in s. 5 does not presuppose transferability. The reference is to cases where custom permits transfers. The words "as other immovable property" in s. 26 must

(1) (1899) I. L. R. 26 Calc. 615. (2) (1910) I. L. R. 37 Calc. 687.
(3) (1908) 8 C. L. J. 161.

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mean "as if it were immovable property". It does not show that the right is property. The absence of any provision for bequest shows that it is not capable of alienation: *Hiramoti Dassya* v. *Annoda Prosad Ghosh* (1). *Vide* s. 11. Take again the case of abandonment or surrender. There cannot be abandonment in permanent tenures. Unless it is a personal right, there cannot be abandonment: see ss. 86 and 87. It is only because the right is personal, that the landlord can re-enter as soon as the tenant ceases to have his connection with the soil. The right of occupancy is a right to occupy and cultivate the soil subject to certain conditions. Let us then look to the sections on Notice.

[MOOKERJEE J. A tenure-holder is only a collector of rent. A raiyat directly cultivates the land.]

[JENKINS C. J. Do you mean to say that a mortgage of an occupancy holding is impossible?]

No.

[JENKINS C. J. Can you mortgage a personal right? See s. 86, cl. (*6*).]

[MOOKERJEE J. Suppose the Legislature said—if a tenure-holder did not collect rent for a year, his right would cease?]

Then, it would be a personal right.

[MOOKERJEE J. Do you say that sections 86 and 87 are limited to cases where the holding is not transferable?]

In the case of a transferable holding, there is no abandonment, but the transferee becomes a *raiyat* of the holding.

[MOOKERJEE J. Can the raiyat abandon in such a case?]

Yes.

(1) (1908) 7 C. L. J. 553.

[MOOKERJEE J. Do you then say that s. 87 applies to a raiyat at fixed rent? Such a raiyat can abandon: see s. 18. Would you say that it is a personal right?]

No right of property can be abandoned. All the cases on the point have been placed before you in the other two cases. All except *Basarat Mandal* v. *Sabulla Mandal* (1) were between the landlord and transferees.

If I cannot question the transfer, the transferee of a part would be entitled to hold the land free.

Ss. 178, cl. (*3*) (*d*) and 183 would have been unnecessary if all occupancy holdings were transferable apart from custom.

[JENKINS C. J. S. 183, illustration, is against you. It indicates that it is transferable *with* the consent of the landlord.]

But a new tenancy is created thereby: *Tara Pershad Roy* v. *Soorjo Kant Acharjee Chowdhry* (2).

S. 6, cl. (*i*) of the Transfer of Property Act also supports my contention.

On the second point, the only case in which the holding and the right were separated were *Jawadul Huq's Case* (3), and the later Full Bench case *Ram Mohan Pal* v. *Sheikh Kachu* (4). It has been held after that that s. 22 applies only where the holding is transferable: *Girish Chandra Chowdhry* v. *Kedar Chandra Roy* (5). This case was followed in *Lakhi Kant Das Mahapatra* v. *Balabhadra Prosad Das* (6).

On the third point, I contend that *Agarjan Bibi's Case* (7) was correctly decided. There is a long current of cases holding that an occupancy raiyat can

(1) (1898) 2 C. W. N. cclxxix.
(2) (1871) 15 W. R. 152.
(3) (1896) I. L. R. 24 Calc. 143.
(4) (1905) I. L. R. 32 Calc. 386.
(5) (1899) I. L. R. 27 Calc. 473.
(6) (1913) 19 C. L. J. 400.
(7) (1910) I. L. R. 37 Calc. 687.

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raise an objection under s. 244 of the Code of 1882: *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (1).

[JENKINS C. J. Is not the *ratio decidendi* of these cases this that a right of occupancy is not saleable property over which the judgment-debtor has a disposing power?]

Yes, some of the other cases are: *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (2) and *Majed Hossein* v. *Raghubar Chowdhry* (3).

[MOOKERJEE J. The question was not discussed as one of principle in any one of these cases.]

Babu Jadu Nath Kanjilal (with him *Babu Karunamoy Ghose*), for the respondent. I purchased a share in execution of a money-decree obtained against the judgment-debtor, a co-sharer raiyat. A mortgage-interest was, however, the subject in dispute. The first question would be—whether the judgment-debtor was entitled to raise an objection. He did not, though he was a defendant in the case.

The next question would be—whether defendants Nos. 1 and 2, who were also co-sharers in the holding, could raise an objection. The landlord could not, as he had purchased a portion. Ss. 25 and 87 are the only sections under which the landlord can come. S. 25 is inapplicable in this case. As regards s. 87, there has been no abandonment here. Some of the co-sharers are in possession. It must therefore be presumed that all co-sharers are in possession. The landlord can have no entry. It would have been different if the entire holding had been transferred. I may transfer a portion. Others in possession may say the transfer is only a paper transaction. At any rate, that is a question between the co-sharers. A landlord cannot have *khas* possession piecemeal.

(1) (1897) I. L. R. 24 Calc. 355. (2) (1899) I. L. R. 26 Calc. 727.
(3) (1899) I. L. R. 27 Calc. 187.

Then again, I have taken symbolical possession. This does not affect a third party. The judgment-debtor cannot object in this case.

Suppose the transferor does not object, or by bar of time cannot object under s. 244, cannot others object? If the vendor does not, a trespasser or a third person cannot.

[HOLMWOOD J. They are all jointly in possession.]

They are tenants in common. There is no survivorship. Defendants Nos. 1 and 2 cannot come under s. 244. At best they can put forward a claim under s. 279. Against others I have a right *in rem*.

The Bengal Tenancy Act is a special Act governing the relationship of landlord and tenant only: *Forbes* v. *Bahadur Singh* (1). For the rights of others, you have to look to the general law: see Mackenzie's Roman Law, Ed. 1911, p. 171, and Dr. Moyle's Roman Law, vol. II, p. 334. Possession must relate to ownership: see Limitation Act. Arts. 136 and 137, A rightful owner, even if out of possession, can transfer his right. Possession is only an accident.

S. 6, cl. (*i*) of the Transfer of Property Act discountenances the extreme contention of the other side that the Bengal Tenancy Act has rendered an occupancy right absolutely non-transferable, except by custom. What is the necessity of the clause? See also clause (*b*). These show clearly that the right is transferable.

[JENKINS C. J. See clause (*d*).]

Yes. It helps me. Moreover, the proviso does not say when and under what circumstances an occupancy right is transferable. The difficulty is not solved.

Nor is this extreme contention supported by s. 19 of the Bengal Tenancy Act. I lay stress on the

(1) (1914) I. L. R. 41 Calc. 926; L. R. 41 I. A. 91.

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word 'otherwise'. What is meant is that an occupancy right is acquirable not only by custom.

[JENKINS C. J. That section does not say anything about rights of occupancy *under the Act.*]

Even under the old Act, there was the provision of acquisition of occupancy rights *otherwise.* The Transfer of Property Act governs all cases, and everywhere, unlike the Bengal Tenancy Act. That is the special value of the word 'untransferable' in s. 6 of the Transfer of Property Act. See also s. 178 of the Bengal Tenancy Act.

The case of *Chandrabati Koer* v. *Harrington* (1), where the extreme contention was raised, is distinguishable. There it was not known how Harrington came in, by inheritance or transfer. The judgment must not, therefore, be taken as an unqualified one in support of the extreme view.

It is only the purchaser, and not the judgment-debtor or decree-holder, who can raise the objection that the judgment-debtor had no saleable interest and so nothing was sold. Moreover, in this case, it would be too late for the judgment-debtor to come in, and as a matter of fact, he never objected. Ss. 244, 312 and 313 are all inapplicable. Can the co-sharers then come in? They are trespassers so far my interest is concerned. The other side says, the landlord may sue. What of that? The landlord does not always implead all. Does that extinguish the rights of others? It does not show that the landlord has not recognized me.

The other extreme contention is that a right of occupancy is property. Babu Tarakishore Choudhuri has argued this question thoroughly. I would only point out that *Sohodwa* v. *Smith* (2) was a case

(1) (1891) I. L. R. 18 Calc. 349. (2) (1873) 12 B. L. R. 82; 20 W. R. 139

under the old rent law. Does the present Act give the tenant only the right to cultivate, as the old Act did or more? If there has been no advance, the ruling would hold good even now. But it is undisputed there has been an advance. A sub-lease can be granted at any time: ss. 85 and 178, cl. (*e*). An occupancy right is treated as property; sections 23 and 77, cl. (*l*). See also *Hari Mohan Misser* v. *Surendra Narayan Singh* (1). The word 'property' is not defined either in the Transfer of Property Act or the Bengal Tenancy Act. The definition of the word in English law is to be taken.

There is lastly the intermediate contention that a right of occupancy is transferable under certain conditions apart from custom. The law and custom on this head fall under two heads: *first*, consent of landlord, and *second*, estoppel.

On the first head. So far back as 1873, it was held that consent was sufficient and that landlord and tenant together could do anything: *Sohodwa* v. *Smith* (2) and *Bootee Singh* v. *Moorut Singh* (3), ss. 73 and 183, ill. (*l*) also support the contention. Ss. 65, 89 and 158 (*b*) (*l*) are a complete answer to any other view. We should read the sections as they are, and not import words into them, as has been done in reading s. 65. The word "holding" is important. A holding can be sold. The landlord can sell anything. The law has put no restraint. The landlord can also ratify after an unauthorised sale.

The several decisions or custom turn on the question whether the transfer was with consent or without. Where there is consent, no question arises. Even where there is a custom, the volition of the

(1) (1907) I. L. R. 34 Calc. 718.
(2) (1873) 12 B. L. R. 82; 20 W. R. 139.
(3) (1873) 20 W. R. 478.

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landlord is a great element: *Buzlal Karim* v. *Satis Chandra Giri* (1).

On the head of estoppel, I need not add anything to what have fallen from the learned counsel in the previous two cases.

Finally, I submit that no new tenancy is created by transfer. On the point, whether transfer of a part is void or voidable: see Woodfall on Landlord and Tenant, 19th Ed., p. 233, *Davenport* v. *Queen* (2) and Pollock on Contract.

Babu Bipin Chandra Mullick, in reply. *Forbes* v. *Bahadur Singh* (3) has no application here. It refers to Chapter VIII of the Bengal Tenancy Act. Ss. 65 and 158 B lay down special procedure for recovery of arrears. Not being a party to the decree and sale, I am entitled to object to the title of the plaintiff.

Cur. adv. vult.

The judgment of the Full Bench (JENKINS C. J., STEPHEN, WOODROFFE, MOOKERJEE AND HOLMWOOD JJ.) was as follows:

These several references have been heard consecutively, and as they involve many of the debatable points that relate to the transferability of occupancy holdings, apart from local usage, it will be convenient to state our conclusion in general terms. This conclusion rests largely on a recognition of the paramount importance of upholding decisions, on which dealings with property have been extensively based. These decisions probably mark a departure from earlier judicial pronouncements and the opinions of those who have studied this question in the past. The life of the law, however, it has been said, is not logic but experience, and the modern departure is

(1) (1911) 15 C. W. N. 752.
(2) (1877) 3 A. C. 115, 128.
(3) (1914) I. L. R. 41 Calc. 926; L. R. 41 I. A. 91.

probably due to a change in economic conditions, which has brought into prominence problems that did not previously call for solution.

The weight of modern authority establishes the following propositions regarding the transfer for value of occupancy holdings apart from custom or local usage:

1. The transfer of the whole or a part is *operative as against the raiyat*,

(*a*) where it is made voluntarily,

(*b*) where it is made involuntarily and the *raiyat* with knowledge fails or omits to have the sale set aside.

A sale is made involuntarily where it is in execution of a money-decree, but not of a decree founded on a mortgage or charge voluntarily made.

2. The transfer is *operative as against the landlord* in all cases in which it is operative against the *raiyat*, provided the landlord has given his previous or subsequent consent. Where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding; but where the transfer is of a part only of the holding, or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (*a*) an abandonment within the meaning of section 87 of the Bengal Tenancy Act, or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy.

Whether there has been a relinquishment or repudiation or not depends on the substantial effect of what has been done in each case.

3. The transfer of the whole or a part is *operative as against all other persons* where it is operative against the *raiyat*.

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Applying then these propositions to the questions propounded, we answer them as follows:

(i) The question in the Appeal from Order No. 455 of 1907 is answered in the affirmative. We accordingly hold that the appellant is a person whose immoveable property has been sold and is a representative of the judgment-debtor under section 244 of the Code of Civil Procedure of 1882. This appeal must therefore be allowed and an order made as prayed. Each party, however, will bear his own costs throughout.

(ii) The question in Appeal from Appellate Decree No. 2388 of 1908 is answered in the affirmative. The decree of the lower Appellate Court is set aside and a decree will be passed in favour of the plaintiff for possession, but each party will bear his own costs throughout.

(iii) The questions in Appeal from Appellate Decree No. 2379 of 1908 are answered as follows: (*i*) in the affirmative, (*ii*) in the negative, (*iii*) in accordance with the propositions above set out. The result will be that this appeal will be dismissed. There will be no order as to costs of the Letters Patent Appeal on this Reference.

We would only add that the uncertainty as to the transferability of holdings has been one of the most fruitful sources of litigation, and it is urgently necessary that it should be set at rest by the Legislature.

S. M.

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

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v. *March 17.*

ASUTOSH GHOSE;

AND

KISHENCHAND KESHARICHAND

v.

SANYASI CHARAN MANDAL.*

Minor—Insolvency—Provincial Insolvency Act (III of 1907), ss. 4, cls. (b) (g), 16—Contract Act (IX of 1872), ss. 11, 247, 253, 254—Infant, adjudication of, as an insolvent—Receiver in Insolvency, powers of—Hindu joint-family—Bankruptcy Act 1883 (46 & 47 Vict., c. 52) ss. 33, 102—Insolvency of partner—Dissolution of partnership.

In India, as in England, an infant partner of a firm cannot as such be adjudicated an insolvent.

Lovell & Christmas v. *Gilbert Walter Beauchamp* (1) followed.

The creditors of the firm are not entitled to proceed against him personally, being restricted only to his interest in the property of the firm (*vide* s. 247 of the Indian Contract Act).

There is no difference in principle between the nature of the liability of an infant admitted by *agreement* in a partnership business and that of another (*e.g.*, a Hindu) on whose behalf an *ancestral* trade is carried on by his guardian.

Joykisto v. *Nittyanand* (2), *Ram Partab* v. *Foolibai* (3) referred to.

It is not open to the Court to direct the receiver in insolvency to deal with assets other than those belonging to the persons who have been adjudicated insolvents.

Lovell & Christmas v. *Gilbert Walter Beauchamp*(1) explained.

* Appeals from Orders, No. 264 and 298 of 1912, against the orders of H. P. Duval, District Judge of 24-Parganas, dated March 15; May 10, 15, and 27, 1912.

(1) [1894] A. C. 607. (2) (1878) I. L. R. 3 Calc. 738.

(3) (1896) I. L. R. 20 Bom. 767, 777.

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Whereas in England the bankruptcy of a partner works dissolution of the partnership without an order of the Court, it is not so in India. *Vide* ss. 253, 254 of the Indian Contract Act.

A receiver appointed under s. 16 of the Provincial Insolvency Act merely replaces the insolvent partner in respect of the business of the firm.

The position of a receiver is the same both with regard to a Hindu joint-family partnership assets and acquisitions therefrom.

APPEAL from original order, No. 298 of 1912, by Kishen Chand Keshari Chand (creditors), petitioners.

APPEAL from original order, No. 264 of 1912, by Sanyasi Charan Mandal (minor), objector.

The facts regarding the proceedings out of which these two appeals arose are briefly as follows. The firm of Bhuban Mohan Mandal and Nil Ratan Mandal carried on a joint family ancestral business in rice and firewood at No. 4-1 Munshigunj Road, Kidderpur, in the District of 24-Parganas, the partners thereof being the five sons of Bhuban Mohan, deceased, *viz.*, Nil Ratan, Amulya Ratan, Satya Charan, Fatick Charan and Sanyasi Charan, the last two being minors. This firm was indebted to Messrs. Kishenchand Kesharichand of No. 199, Harrison Road, Calcutta, in the liquidated sum of Rs. 2,500 payable on a hundi, dated 28th December, 1911. On the 19th February 1912, the creditor firm made an application in the Court of the District Judge, 24-Parganas, to have all the partners of the debtor firm adjudicated insolvents under the provisions of the Provincial Insolvency Act on the allegation that they had committed various acts of insolvency during the preceding three months, and also prayed for the appointment of a receiver, under Act III of 1907, of all the properties of the said owners and partners of the debtor firm. At the time this application was made one of the two infants had attained majority, but the other, Sanyasi Charan, continued so till the disposal of the appeals

in the High Courts. On the objection of the infant, the learned District Judge dismissed the application for adjudication of the infant as an insolvent, but granted it with regard to the four other partners and appointed a receiver of all the four businesses and of all the properties purchased since the death of Bhuban and four-fifths only of the other properties alleged to have been inherited by all the brothers from their father. Thereupon exception was taken to this order by way of two separate appeals to the High Court at the instance of the infant as well as the creditor firm.

Mr. B. Chakravarti (with him *Babu Umakali Mookerjee*, *Babu Satish Chandra Mookerjee* and *Babu Khetra Gopal Banerjee*), for Kishen Chand Keshari Chand, appellants in A. O. O. No. 298 of 1912 and also for the respondent in A. O. O. No. 264 of 1912. My submission is that the receiving order should include all the property including that of the infant.

[*Dr. Ghose.* But s. 16, cl. (*2*) of the Provincial Insolvency Act is conclusive.]

Refers to Williams on Bankruptcy p. 160 *re* separate and joint creditors, Lindley on Partnerships, 7th Ed. p. 716, and *Lovell* v. *Beauchamp* (1).

The Official Trustee becomes a tenant in common. An adjudication order against one partner only, puts a person in possession of the whole of the assets of the firm.

[*Dr. Ghose.* The security did not comprise the infant's share.]

If the brothers could sell for *bona fide* debts of the family, then the Trustee in Bankruptcy, who takes their place, can do so too.

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The whole of the property ought to be in the hand of the receiver.

Dr. Rash Behary Ghose (with him *Babu Panchanan Ghose* for *Babu Khetra Mohan Sen*), for the minor, Sanayasi Charan, respondent in A. O. O., No. 298 of 1912 and appellant in A. O. O., No. 264 of 1912. I submit that the question before your Lordships is a very narrow one now, as my client cannot be adjudicated an insolvent under the Provincial Insolvency Act he being a minor.

The partnership is dissolved as soon as the adjudication order is made and the receiver becomes a tenant in common with the other partners who are solvent. I object to that portion of the District Judge's order regarding any property (other than the business of the family) which was not ancestral: see section 247 of the Indian Contract Act. The creditor can only follow the share of the minor in the business. This can only be done by applying to the Court in the ordinary way under the Provincial Insolvency Act to wind up the partnership business. I submit, therefore, that my learned friend's appeal must fail and my appeal must succeed.

Mr. Chakravarti, in reply. As four brothers are adults and insolvents and the fifth brother an infant, the most convenient course to take is to give the receiver charge of all the property, otherwise it would be impossible to wind up the business. This is a liability incurred by the four brothers without the consent of the minor; and, if they alone are liable, then the property is theirs. If the minor wants to get a share in this property, he must also incur a liability for the debts incurred for the purpose of the acquisition of this property. If your Lordships will not decide that question in these proceedings, then keep this property safe, and let it be decided in the

proper *forum*. There is no difference between the Dayabhaga and the Mitakshara on the subject of after-acquired property in a joint family ancestral trading business. Here an active representation was made by the infant that Nilratan had authority to sign for the firm.

[MOOKERJEE J. Have you got the account books here showing the funds?]

The receiver is in attendance here and says that these account books are in the lower Court.

[MOOKERJEE J. How do you propose to get over the provisions of section 16 of the Provincial Insolvency Act?]

All the property vests in the Receiver: see *Lovell and Christmas* v. *Beauchamp* (1).

[MOOKERJEE J. Only the interest of the person declared insolvent vests in the receiver.]

The Trustee in Bankruptcy takes four-fifths share, *i.e.*, of the insolvents, and as receiver takes charge of one-fifth share of the minor till his status is decided in a title suit.

MOOKERJEE AND BEACHCROFT JJ. These appeals are directed against an order under section 16 of the Provincial Insolvency Act of 1907. The circumstances under which the order in question has been made may be briefly narrated. One Bhuban Mohan Mandal left five sons: Nil Ratan, Amulya Charan, Satya Charan, Fatick Charan and Sanyasi Charan. During his lifetime, Bhuban Mohan Mandal carried on business in cloth, rice and fuel. After his death, his sons, two of whom were infants, inherited the firms mentioned. On the 19th February 1912,

(1) [1894] A. C. 607.

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Kishenchand Kesharichand, the appellant in one of these appeals, made an application under the Provincial Insolvency Act to have the partners of these firms adjudicated insolvents. At the time the application was made, one of the two infants had already attained majority, but the other Sanyasi Charan was and is even now, an infant. The District Judge found upon the evidence that the acts of insolvency imputed to four of these persons had been established, namely, that they had acted in the manner described in clauses (*b*) and (*g*) of section 4 of the Provincial Insolvency Act. The District Judge thereupon declared the four adult brothers, insolvents. But he dismissed the application for adjudication of the infant as insolvent, because, in his opinion, the infant could not be declared an insolvent. He further appointed a receiver and directed him to proceed to realise the assets of all the four businesses and of all the properties purchased since the death of Bhuban and four-fifths only of the other properties which, it was alleged, had been inherited by all the five brothers from their father. Exception has been taken to this order by the infant as also by the creditor at whose instance these proceedings have been commenced.

The infant objects to the validity of the order on the ground that the receiver was not competent to realise in its entirety the assets of the business and of the properties acquired since the death of his father. His contention is that the property of his four insolvent brothers alone had, under section 16 of the Provincial Insolvency Act, vested in the receiver who was consequently competent to realise a four-fifths share only of the assets of the partnership business as also of all after-acquired properties. The objection urged by the creditor is twofold, namely, *first*, that the infant should have been adjudged an insolvent;

and, *secondly*, that, in any view, the receiver was entitled to realise the whole of the properties inherited by the five brothers from their father.

The question for determination, is, whether the infant should have been adjudicated an insolvent. On behalf of the creditor it has been argued that although, under the law of England, an infant is not liable to be adjudicated an insolvent, the principle on which that doctrine is based is not recognised in this country, and consequently the doctrine itself should not be applied here. There is no room for controversy, as is clear from the decision of the House of Lords in *Lovell & Christmas* v. *G. W. Beauchamp* (1), that the District Judge correctly held that under the English Law, an infant partner cannot be adjudicated an insolvent. The question for determination is, whether a different view should be taken under the Indian law. Section 247 of the Indian Contract Act provides that a person who is under the age of majority according to the law to which he is subject may be admitted to the benefits of a partnership but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm. It is not necessary for our present purpose to determine whether the principle which underlies section 247 is in harmony with the principle which underlies section 11 as interpreted by their Lordships of the Judicial Committee in *Mohori Bi i* v. *Dharmo Das Ghose* (2). But the position is incontrovertible that an infant may be admitted to the benefits of a partnership although he cannot be made personally liable for any obligation of the firm; yet the share of the infant in the property of the firm is liable for the

(1) [1894] A. C. 607.

(2) (1903) I. L. R. 30 Calc. 539; L. R. 30 I. A. 114.

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obligation of the firm. It has been urged on behalf of the creditor-appellant that as the infant is liable to satisfy the debts of the firm, though it may be to the extent of his interest in the property of the firm, he is liable to be adjudicated an insolvent, if it transpires that the debts of the firm cannot be satisfied out of the property of the firm. In our opinion, the contention is obviously fallacious. As regards the infant partner, the creditors of the firm are not entitled to proceed against him personally. They are restricted to a special fund, namely, his interest in the property of the firm. If the value of such interest is not sufficient for the satisfaction of the dues of the creditors, it cannot be maintained that the infant is unable to pay his debts which must be the true foundation of all proceedings in insolvency against him. The remedy of the creditors is restricted in its scope, and if that remedy is partial, it cannot be maintained that the person against whom the limited remedy is available is liable to be declared an insolvent. Indeed, he may have ample funds other than the partnership assets, though such funds cannot be reached by the creditors of the firm, simply because under the law they cannot hold him personally liable to satisfy the obligations of the firm. We are of opinion that the law under the Indian Contract Act does not in this respect differ from the English law on the subject and that here, as in England, an infant partner of a firm cannot, as such, be adjudicated an insolvent.

Our attention has been also invited to the circumstance that a joint Hindu family firm is not in all respects on the same footing as an ordinary partnership arising out of a contract. It has been argued that the rights and obligations of the coparceners cannot be determined by exclusive reference to the

provisions of the Indian Contract Act, but must be considered also with regard to the rules of the Hindu Law which regulate the transactions of Hindu families; and as an illustration of this fundamental difference, reference has been made to the rule that the death of one of the coparceners does not dissolve a Hindu family partnership. This position may be accepted as sound. But it is equally clear that there is no difference in principle between the nature of the liability of an infant admitted by agreement into a partnership business and that of another on whose behalf an ancestral trade is carried on by his guardian. It is on this basis that it has been ruled in the cases of *Joykisto* v. *Nittyanand* (1) and *Ram Partab* v. *Foolibai* (2), that a Hindu infant, on whose behalf a family trade is carried on, is not personally liable for the debts incurred in such a trade, but his share therein is alone liable. In so far as the propriety of the order of the District Judge with regard to the infant is concerned, we must consequently overrule the contention of the creditor.

The question next arises, what is the precise position of the receiver appointed under section 16 of the Provincial Insolvency Act. On behalf of the creditor, it has been argued that he is entitled to take possession of, and to realise the entire assets of, the trading firms, all the after-acquired properties and also all ancestral properties inherited by the five brothers. In support of this proposition, reliance has been placed upon the decision of the House of Lords in *Lovell and Christmas* v. *G. W. Beauchamp* (3). That case, at first sight, seems to lend some support to the contention of the creditor, but upon closer examination, turns out to be of no real assistance to him. In

(1) (1878) I. L. R. 3 Calc. 738. (2) (1896) I. L. R. 20 Bom. 767, 777.
(3) [1894] A. C. 607.

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that case, Gilbert Walter Beauchamp was a partner in the firm of Beauchamp and Brothers. He was an infant and the other partner was Ralph Beauchamp. Goods which had been supplied upon the order of the firm were not paid for. An action was consequently brought in the Queen's Bench Division against the firm in the firm's name. An appearance was entered for Ralph and also for Gilbert, the infant, by his guardian *ad litem*. Objection was taken on behalf of the latter that the infant could not be made liable. This objection was overruled, and, on the 2nd August 1893, an order was made adjudging the plaintiff to recover against the defendants the sum claimed. A similar judgment was obtained by another creditor who had supplied goods to the firm. On appeal to the Divisional Court to set aside the latter judgment, the application was dismissed, but it was also ordered that execution was not to issue against the separate property of the infant or against his share, if any, in the partnership profits. The Court of Appeal refused to disturb the order thus made by the Divisional Court: *Harris* v. *Beauchamp* (1). On the 2nd August 1893, that is, on the date when the first judgment had been obtained, Lovell and Christmas (the persons who had obtained the judgments) served a bankruptcy notice on Beauchamp Brothers, founded on their judgments intimating that if the requisitions of the notices were not complied with, an act of bankruptcy would be committed. The money was not paid and the creditors presented a petition for a receiving order in respect of the estate of Beauchamp Brothers, whereupon a receiving order was made. This order was rescinded by the Court of Appeal, on the ground that as one of the partners was an infant, the receiving order could not properly be made against

(1) [1893] 2 Q. B. 534.

the firm: *In re Beauchamp Brothers* (1). The Court of Appeal granted leave to appeal to the House of Lords, but on the terms that the judgment of the Queen's Bench Division of the 2nd August 1893, should be treated as affirmed in the Court of Appeal, with leave to the respondent Gilbert to lodge a cross-appeal. The position consequently was that when the matter was taken to the House of Lords, the question of the validity of the judgment in the suit against the firm as also of the order made in the partnership proceeding were both open for consideration. It was, under these circumstances, that Lord Herschell stated that the judgment was erroneous and required to be amended; and he directed it to be amended by the insertion of the words "other than Gilbert Walter Beauchamp" after the word "defendant." Lord Herschell after giving this direction, proceeded to observe as follows: "I think the proper course will be to amend it in the manner which I have suggested. It will thus constitute, as from its date, a valid receiving order against Ralph Beauchamp, and, I think, the receiver appointed under that order should also be appointed receiver of the partnership assets for the purpose of protecting them for the benefit of the creditors." It is plain that the order authorising the receiver to deal with the partnership assets for the purpose of protecting them for the benefit of the creditors was made, not merely in the partnership proceeding, but also in the proceeding on the judgment against the firm, as there was, in fact, a judgment against the firm represented by the adult partner. The decision of the House of Lords cannot, consequently, be rightly regarded as an authority for the proposition that in a bankruptcy proceeding, it is open to the Court to direct the receiver to deal with

(1) [1894] 1 Q.B. 1.

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assets other than those belonging to the persons who had been adjudged insolvents. It would, indeed, be surprising if the Court could, in a proceeding under the Insolvency Act, deal with the property of a person who had not been adjudged an insolvent. This is plain from familiar statements in books of authority: "on the bankruptcy of one only of several persons, the joint assets do not vest in the trustee. Consequently, an action in the Chancery Division to ascertain the share of the bankrupt was formerly necessary, but now under section 102 of the Bankruptcy Act, 1883, the Court in Bankruptcy can ascertain such share. It is, however, not so in the case of an infant" [Lindley on Partnership, 8th Edition, p. 762.] Section 102 of the Bankruptcy Act, 1883, to which reference is made, is in these terms: "Every Court having jurisdiction in bankruptcy under the Act shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or of fact, which may arise in any case of bankruptcy, coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case". To the rule thus laid down a proviso is added that "the jurisdiction hereby given shall not be exercised by any County Court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto or the money, money's worth or right in dispute does not, in the opinion of the Judge, exceed in value £ 200". The following is an accurate statement of the principles which govern the matter now before us: "Upon the bankruptcy of a partner his power over the partnership property ceases

from the commencement of the bankruptcy, and his share of the property, that is, of the surplus after payment of the partnership debts and the claims of all his co-partners, will vest together with his all other separate estate, in his trustee, who, in respect of the bankrupt's share of the partnership assets, will become tenant-in-common with the solvent partner and entitled to have the partnership affairs wound up according to the rule in bankruptcy" [Robson on Bankruptcy, 7th Edition, p. 682]. This position is amply supported by judicial decisions of the highest authority, amongst which may be mentioned specially *Fox* v. *Hanbury* (1), *Ex parte Rufftn* (2) and *Fraser* v. *Kershaw* (3).

We may observe that the principle formulated in the cases just mentioned rests on the theory familiar to English lawyers, that the bankruptcy of one partner operates as a dissolution of the partnership among all other partners: *Fox* v. *Hanbury* (1), *Ex parte Smith* (4), and *Crawshay* v. *Collins* (5). It is essential to note, however, that the effect of the bankruptcy of a partner on the partnership, is not in this country, identical with that under the law of England, as becomes clear from a comparison of section 33 of the Bankruptcy Act, 1890, with the provisions of sections 253 and 254 of the Indian Contract Act. Under the Bankruptcy Act, 1890, bankruptcy is placed on the same footing as death, and there is a dissolution of partnership by reason of the death or bankruptcy of one of the partners. In section 253 of the Indian Contract Act, on the other hand, in the absence of any contract to the contrary, the relation of partners to each other is determined by the death of any partner,

(1) (1776) Cowper 445.
(2) (1801) 6 Ves. 119.
(3) (1856) 2 K. & J 496, 499.
(4) (1800) 5 Ves. 295.
(5) (1808) 15 Ves. 218, 278.

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whereas under section 254, at the suit of a partner, the Court may dissolve the partnership when a partner, other than the partner suing, has been adjudicated an insolvent under any law relating to insolvent debtors. Thus, whereas in England the bankruptcy of a partner works a dissolution without an order of the Court, in this country the bankruptcy of a partner may have the same effect, only if a suit is instituted for dissolution of partnership on that ground by a partner other than the one who has been adjudged insolvent. Consequently, in this country, when a person has been adjudicated an insolvent, the partnership is not necessarily dissolved, and the receiver who is appointed under section 16 of the Provincial Insolvency Act, merely replaces the insolvent partner in respect of the business of the firm, that is, the receiver and the partners who have not been adjudicated insolvents continue to constitute the firm. It may possibly be open to the receiver to take steps for the dissolution of the partnership, but he cannot claim, as Receiver in insolvency, to take exclusive possession of the assets of the firm, including, in this case, the interest of the infant who has not been adjudicated an insolvent. We are clearly not concerned, in the present proceedings, with the question, whether the particular debt which the creditor seeks to realise may be realisable from the interest of the infant in the firms; that is a question which can be adjudicated in a suit properly framed for the purpose. What concerns the Court in these proceedings is the true position of the Receiver in relation to the partnership property. As regards such property, we feel no doubt whatever that he is not entitled to deal with the entire assets inclusive of the interest of the infant who has not been adjudicated an insolvent.

A question has been raised before us not only as to the partnership assets, but also as to what has been described as the after-acquired properties. On behalf of the creditor, it has been contended that the after-acquired properties have not only been acquired out of the funds of the partnership but that they have not been treated as part of the partnership property. In the view we take, the distinction suggested is immaterial, because whether what is described as after-acquired property be treated as included in the partnership assets or be deemed independent thereof, the receiver is not entitled to take possession of and to deal with more than the four-fifths share held by the persons adjudicated insolvents. In respect of these properties, the receiver is precisely in the same position as the persons who have been adjudicated insolvents and have been replaced by him by operation of law. The essence of the matter is that the share of the infant has not vested in him, and he is consequently not entitled to deal with it. The receiver may, if so advised, institute a suit for dissolution of the partnership, in which appropriate proceedings may be taken for realisation of the assets. The creditor also may, if so advised, pursue his remedy, if any, against the infant in a suit properly framed for enforcement of his claim. But whatever remedies may be available hereafter to the receiver or to the creditor, it is clear that the properties of the infant cannot be dealt with by either of them in these proceedings.

The result is that the appeal of the creditor (No. 298 of 1912) is dismissed and the appeal of the infant (No. 264 of 1912) is allowed. The order of the District Judge is varied in the manner following. The receiver will take possession of four-fifths share of the business and four-fifths share of all the proper-

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ties purchased since the death of Bhuban Mohan Mandal as also four-fifths share of other properties jointly held by the infant and his brothers.

The creditor will pay the costs of the infant in both the appeals.

G. S.

Infant's appeal allowed; Creditor's appeal dismissed.

CRIMINAL REFERENCE.

Before Sharfuddin and Teunon JJ.

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May 22.

EMPEROR

v.

JOGENDRA NATH GHOSE.*

Perjury—Witness—Deposition not read over to witness in the hearing of accused or his pleader but read by witness himself—Inadmissibility of deposition in subsequent trial for giving false evidence—Proceeding against witness—Preliminary inquiry—Omission to record statements of witnesses examined thereat—Order for prosecution not containing assignment of the false statements—Criminal Procedure Code (Act V of 1898) ss. 360(1), 476—Practice.

Section 360(*1*) of the Criminal Procedure Code requires the evidence of a witness to be read over to him in the hearing of the accused or his pleader, so as to enable the latter to correct any mistakes in it. The reading of the deposition by the witness himself is not a compliance with the section, and renders the record of it inadmissible in a subsequent trial against him under s. 193 of the Penal Code.

Mohendra Nath Misser v. *Emperor* (1) and *Jyotish Chandra Mukerjee* v. *Emperor* (2) followed.

Although s. 476 of the Criminal Procedure Code does not expressly provide for the manner in which the preliminary inquiry thereunder is

* Criminal Reference, No. 95 of 1914, by R. L. Ross, Sessions Judge of Darbhanga, dated April 22, 1914.

(1) (1908) 12 C. W. N. 845. (2) (1909) I. L. R. 36 Calc. 955.

to be recorded, a summary of the statements of the witnesses examined thereat should be made.

An order under the same section, directing the prosecution of a person for giving false evidence, should set out the statements alleged to be false.

ON the 19th September 1913, one Manohar Potedar, of village Kachua, lodged a complaint before the Sub-divisional Officer of Madhubani, against Banku Singh and others, of trespass into his shop, assault and theft. The accused were placed on trial before a local Sub-Deputy Magistrate, when Banku set up an *alibi* and examined Jogendra Nath Ghose, a Sub-Assistant Surgeon of Darbhanga, who deposed that Banku had been under his treatment for intermittent fever daily from the 13th to the 25th September, and had resided during this period at Kathalbari in Darbhanga. The record of the deposition did not state on the face of it that it was read over to the witness in the presence of the accused or his pleader, in accordance with the terms of s. 360(*1*) of the Criminal Procedure Code, but it appeared from the explanations of the District Magistrate, the Sub-Deputy and his *peshkar*, that after the witness' evidence had been taken down, the record was handed over to him and that he perused it himself. The original accused were convicted and sentenced in the case, on the 23rd December 1913, and appealed to the District Magistrate who dismissed the appeal on the 20th February 1914. Both the Trial and the Appellate Courts disbelieved Jogendra Nath Ghose.

Thereafter, the District Magistrate took action against Jogendra and held a preliminary inquiry under s. 476 of the Criminal Procedure Code, but did not record the statements of the witnesses examined during the course of it. On the 30th March 1914 he directed the prosecution of Jogendra,

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under s. 193 of the Penal Code, for giving false evidence, but the order did not contain the statements alleged to be false.

Jogendra thereupon moved the Sessions Judge of Darbhanga who referred the case to the High Court, under s. 438 of the Criminal Procedure Code, recommending the reversal of the order under s. 476 on the grounds, *first*, that the written record of the deposition was inadmissible for non-compliance with the provisions of s. 360(*1*) of the Code, and that the prosecution must, therefore, fail according to the ruling in *Mohendra Nath Misser* v. *Emperor* (1); and, *secondly*, that the evidence of Jogendra was not necessarily inconsistent with the story of the presence of Banku at the occurrence on the date and at the time assigned for it.

Babu Atulya Charan Bose and *Babu Manomohan Bose*, for the accused.

Mr. S. Ahmed, for the Crown.

SHARFUDDIN AND TEUNON JJ. This is a reference made by the Sessions Judge of Darbhanga under section 438 of the Criminal Procedure Code. It appears that the prosecution of the petitioner before him has been directed under section 193 of the Indian Penal Code with reference to a deposition given by that witness in a case against one Banku Singh. The Sessions Judge has recommended that the order directing the petitioner's prosecution should be set aside on the ground that, in respect of that deposition, the provision of section 360 sub-section(*1*) of the Criminal Procedure Code has not been complied with. The explanations submitted by the trying Magistrate, his officer, and the District Magistrate show that what happened was

(1) (1908) 12 C. W. N. 845.

that, after the deposition had been recorded, the record was handed over to the petitioner. He then proceeded to read it over himself. We are of opinion that that is not a sufficient compliance with the provisions of section 360 sub. s. (*1*) of the Criminal Procedure Code, inasmuch as that sub-section requires that the evidence should be read over in the presence, that is, in the hearing of the accused, in order that the accused should have an opportunity of correcting any mistake in it. On the authority, therefore, of the case cited by the learned Sessions Judge [*Mohendra Nath Misser* v. *Emperor* (1)] and also on the authority of the case of *Jyotish Chandra Mukerjee* v. *Emperor* (2), we must hold that this deposition is inadmissible in evidence. The order for the prosecution of the petitioner must be set aside.

We would further point out to the District Magistrate that in this case, in his order for prosecution, or in any proceeding referred to therein, he has failed to set out the statements alleged to be false.

We further find from his explanation that, though he made a preliminary enquiry under section 476 of the Criminal Procedure Code, and presumably examined witnesses in the course of that enquiry, he has made no record of their statements. We do not find in the Criminal Procedure Code any provision with regard to the manner in which the evidence in such enquiry should be recorded. But we are of opinion that for future reference a summary of the statements should have been made.

The petitioner is discharged from his bail.

E. H. M.

(1) (1908) 12 C. W. N. 845. (2) (1909) I. L. R. 36 Calc. 955.

PRIVY COUNCIL.

P.C.

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May 1, 26.

JALANDHAR THAKUR

v.

JHARULA DAS.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Limitation—Limitation Act (IX of 1908) Sch. I, Art. 124—(Act XV of 1877) Sch. II, Art. 124—Hereditary office of shebait -Successor of shebait when bound by decree against predecessor in shebaitship—Decree-holder and purchaser at sale in execution who by reason of low caste is not competent to hold office of shebait—Adverse misappropriation of temple income by trespasser incompetent to be shebait—Wrongful possession not constituting wrongful holder shebait—Res judicata.

This was an appeal from the decision of the High Court in the case of *Jharula Das* v. *Jalandhar Thakur* (1) in which the widow of the shebait of a temple (the shebaits of which were Brahmin Pandas) who succeeded her deceased husband in that office, mortgaged land together with her interest in the income of the temple to the defendant (who was not a Brahmin). The defendant obtained a decree on his mortgage on 24th September 1880, in execution of which he put up for sale the share of the temple income, purchased it himself, and got delivery of possession in 1892. The widow died in May 1900. In a suit brought on 28th January 1910 for the land and mesne profits, and for a declaration that the plaintiff was entitled to receive the share of the temple income as it was inalienable, the defence was that the suit, so far as it related to the temple income, was barred as being *res judicata*, and by limitation.

Held by the Judicial Committee (reversing the decision of the High Court), that Art. 124 of the Limitation Act was not applicable. The suit was not one for an hereditary office which could not be held by a person who was not a Brahmin, and the defendant was therefore not competent to hold the office of shebait, and had not taken possession of it. By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings the defendant acquired no title, and no right to a share of that

* *Present*: Lord Moulton, Lord Parker of Waddington, Sir John Edge and Mr. Ameer Ali.

(1) (1912) I. L. R. 39 Calc. 887.

income. On each occasion on which he received and wrongfully appropriated to his own use a share of the income to which the shebait was entitled the defendant committed a fresh actionable wrong in respect of which a suit could be brought against him by the shebait ; but it did not constitute him the shebait for the time being, or affect in any way the title to the office.

Held, also, that the defence (which had been upheld by the High Court) that the suit was barred as *res judicata* by the decision in a former suit brought by the widow to set aside the sale of the temple income, was not maintainable.

APPEAL No. 68 of 1913 from a judgment and decree (12th March 1912) of the High Court at Calcutta which partly affirmed and partly reversed a judgment and decree (3rd April 1911) of the Court of the Subordinate Judge of Bhagalpur.

The representatives of the plaintiff were the appellants to His Majesty in Council.

The original plaintiff, Bhaiaji Thakur, was a Brahmin panda, and one of the shebaits of an ancient Hindu temple of Mohadeoji, called Singheswar, in Mauza Gouripur, in Bhagalpur district. The shebaits perform the sacred worship or *puja* of the Deity, and receive offerings made to the Deity by the worshippers. After defraying the expenses of the management of the temple, and the charities connected with it, the pandas divide the balance of the income among themselves in proportion to their rights for services rendered by them. The right to participate in the offerings is in return for the services rendered from day to day by the pandas. Jalandhar Thakur and Holdhar Thakur were made parties on the death of Bhaiaji in the course of the suit.

The respondent (defendant) was a Beldar by caste, and therefore not a member of the twice-born castes.

The facts of the case are sufficiently stated in the report of the appeal to the High Court which will be found in I. L. R. 39 Calc. 887.

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The Subordinate Judge decreed the plaintiff's claim; but the High Court (COXE and IMAM JJ.) held that the suit, so far as the claim to receive a share of the surplus profits of the temple offerings, was barred by limitation; and as being *res judicata* by the decision in a former suit.

On this appeal,

A. M. Dunne and *B. Dubé*, for the appellants, contended that the suit was not barred either by *res judicat* or by limitation [*Lowndes* said he relied not on *res judicata* but on limitation only.] A woman as shebait had no greater power than a Hindu widow had with regard to the estate of her husband, or than any other female heir with a like estate. She had no right therefore to alienate any part of the shebait property: *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1). It was submitted that the shebait's right to receive the 3½ annas share of the surplus profits of the offerings made to the Deity was not alienable; and that in any case what was purchased by the respondent at the sale of 20th November 1891, was the right of Musammat Grihimoni which came to an end at her death. As to limitation, the case was governed by Article 124 of Schedule 1 of Act IX of 1908; "12 years, for possession of an hereditary office." And the cause of action arose "when the defendant takes possession of the office adversely to the plaintiff": *see* the definition of "plaintiff" in section 2 of the Limitation Act IX of 1908. The cause of action arose on the death of Grihimoni in May 1900, and the suit having been brought on 28th January 1910, was, it was submitted, not barred. Reference was made to *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (2).

(1) (1875) L. R. 2 I. A. 145, 153 : 14 B. L. R. 450, 460.

(2) (1899) I. L. R. 23 Mad. 271 ; L. R. 27 I. A. 69.

G. R. Lowndes, for the respondent, contended that his possession of the share in the temple offerings was adverse to Bhaiaji Thakur and therefore to the appellants from its inception, namely, from 30th March 1892, more than 12 years before the suit was instituted, and the suit was therefore barred under Article 124 of Schedule I of the Limitation Act (IX of 1908): *Pydigantam Jagannadha Row* v. *Rama Doss Patnaik* (1). The position of a widow as shebait was that she had larger powers of alienation than she would have had as a mere Hindu widow; she had the same estate, the same powers, and the same right of alienation as a male shebait. As a mere widow she could only alienate for necessity. But as shebait she had more than a life estate; and a succeeding shebait could not dispute his predecessor's alienation: adverse possession which would bar the widow barred the reversioner. Reference was made to *Katama Natchier* v. *Rajah of Shibagunga* (2), *Pertab Narain Singh* v. *Trilokhinath Singh* (3), and *Nobin Chunder Chuckerbutty* v. *Gurupersad Doss* (4); and Articles 140 and 141 of the Limitation Act, Schedule I.

Dunne replied.

The judgment of their Lordships was delivered by

May 26.

SIR JOHN EDGE. The appellants here are the heirs and legal representatives of one Bhaiaji Thakur, now dead, who was the plaintiff in the suit in which this appeal has arisen. Bhaiaji Thakur was a Shebait of an ancient temple of Mahadeoji, called The Singheswar Temple, which is situate in Mauza

(1) (1904) I. L. R. 28 Mad. 197, 199.
(2) (1863) 9 Moo. I. A. 539, 588, 589, 603, 604.
(3) (1884) I. L. R. 11 Calc. 186, 197: L. R. 11 I. A. 197, 206.
(4) (1868) B. L. R. Sup. Vol. 1008: 9 W. R. 505.

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Gouripur, otherwise Singheswarpur, in the district of Bhagalpur. Bhaiaji Thakur became a shebait of the Temple on the death in 1900 of one Musammat Grihimoni who was the widow of one Pratipal Thakur. Pratipal Thakur had been a shebait of the Temple, and until his death had been, as such shebait, entitled to receive a 3½ annas share of the daily surplus income from the offerings to, after defraying the expenses of, the Temple; on his death his widow Musammat Grihimoni, succeeded to his shebaitship and accordingly became entitled to receive the same share of the daily surplus income from the offerings. The right to such 3½ annas share came to Bhaiaji Thakur on the death of Musammat Grihimoni as the next reversionary heir under the Hindu Law to the shebaitship. The shebaits of the Temple are Brahmin Pandas who, as shebaits have to perform, or to provide for the performance of, the sacred worship or *puja* of the Deity at the Temple. Jharula Das, who is the defendant to the suit and the respondent to this appeal, is by caste a Beldar, and, as a Beldar, is not competent to perform, or to provide for the performance of, the sacred *puja* to the Deity at the Temple, and consequently was incapable of acquiring or holding the office of a shebait.

In 1880, Jharula Das obtained a decree for money on a mortgage which had been granted by Musammat Grihimoni. In execution of that decree Jharula Das in 1891 caused the 3½ annas share of Musammat Grihimoni to be put up for sale, and at the sale on the 20th November 1891 purchased the share. Jharula Das on the 8th February 1892 obtained a certificate of sale in which the property which he had purchased was described as the "Income of the Muth of Sri Singheswarthanji Mahadeo, which muth is situated in Mouzah Singeswarthan, pergunnah, Nisankhipur

Khurha, to the extent of 3 annas 6 pies, which belongs to the judgment-debtor, within the jurisdiction of the Madhepura Sub-registry Office, Bhagalpur Collectorate."

In November 1892, Musammat Grihimoni and Bhaiaji Thakur brought a suit against Jharula Das to have the sale to him of the 20th November 1891 set aside. That suit was by the permission of the Court withdrawn by Musammat Grihimoni and Bhaiaji Thakur with liberty to bring a fresh suit on the same cause of action. In 1895, Musammat Grihimoni brought a fresh suit against Jharula Das to have the sale set aside on the ground that the decree and the order for sale had been fraudulently obtained by Jharula Das. The suit of 1895 was dismissed on appeal on the ground that her proper remedy was by an application under section 244 of the Code of Civil Procedure, 1882, to dispute the validity of the sale, and consequently that the suit did not lie. Their Lordships fail to understand how section 244 of the Code of Civil Procedure, 1882, could have applied to a suit which in effect was brought to set aside the decree of 1880, and the order for sale, on the ground that Jharula Das had obtained them by fraud.

Musammat Grihimoni died in 1900. On the 25th January 1910, Bhaiaji Thakur brought the present suit in the Court of the Subordinate Judge of Bhagalpur and claimed possession of certain lands and mesne profits and a declaration that he was entitled to receive the 3½ annas share of the net income from the offerings to the Temple with other reliefs. In his written statement the defendant Jharula Das alleged, so far as is now material, that Bhaiaji Thakur was bound by the decree which dismissed Musammat Grihimoni's suit of 1895, and that the

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decision in that suit operated on the principle of *res judicata* to defeat the claim in respect of the 3½ annas share. At the trial, a defence that the suit was barred by limitation was raised. As to the defence of *res judicata*, the Subordinate Judge rightly held that the decision in Musammat Grihimoni's suit of 1895 did not operate as a bar to this suit. On the question of limitation, the Subordinate Judge found that Jharula Das had not purchased the right of shebaitship, but the Subordinate Judge held that the appropriation by Jharula Das of the 3½ annas share of the surplus income from the offerings to the Temple practically amounted to a dispossession, and treating Bhaiaji Thakur's suit, so far as it related to the 3½ annas share, as a suit for the establishment of his right to shebaitship and for recovery of the profits of that office, and having found that Musammat Grihimoni had died in 1900, he applied Article 124 of the First Schedule of the Indian Limitation Act, 1908, and decided that the suit had been brought within time. On the 3rd April 1911, the Subordinate Judge gave to the appellants here, who had been brought on the record as the representatives of Bhaiaji Thakur, who had died, a decree for possession of the land claimed, for possession of the 3½ annas share of the net income from the offerings to the Temple, and for mesne profits subsequent to the institution of the suit. From that decree of the Subordinate Judge, Jharula Das appealed to the High Court of Judicature at Fort William in Bengal. The High Court in the appeal upheld the decision of the Subordinate Judge so far as it related to the land claimed and to mesne profits in respect of the wrongful possession by Jharula Das of that land, and to that extent by their decree affirmed the decree of the Subordinate Judge. With that part of the decree

of the High Court this appeal is not concerned. Those learned Judges of the High Court considering that Article 124 of First Schedule of the Indian Limitation Act, 1908, applied to the claim in respect of the 3½ annas share of the surplus daily income from the offerings to the Temple, and being of opinion that the 12 years' period of limitation provided by that Article began to run in 1892, when Jharula Das first began to appropriate to his own use the income of the 3½-annas share, decided that the claim in respect of the 3½-annas share was barred by limitation. They also held that the claim to the share was barred by the principle of *res judicata*, arriving at that decision apparently on the view that the dismissal of Musammat Grihimoni's suit of 1895 extinguished the claim of the shebait to the 3½-annas share. Accordingly, the High Court by its decree of the 12th March 1912 set aside the decree of the Subordinate Judge so far as it related to the claim to the 3½-annas share and the profits of that share. From that decree of the High Court the present appellants have appealed to His Majesty in Council. The defendant Jharula Das has not appealed.

On the hearing of this appeal, the contention that the dismissal of Musammat Grihimoni's suit of 1895 extinguished the right of the shebaits to the 3½-annas share, and that the claim in respect of that share was *res judicata* was very properly abandoned; it was untenable. But it was strongly contended on behalf of the respondent that the claim in respect of that share came within Article 124 of the First Schedule of the Indian Limitation Act, 1908, and was barred by limitation. It is not necessary for their Lordships to consider whether, if that Article applied, the 12 years' period of limitation began to run in 1892 or on the death of Musammat Grihimoni in 1900, as they are of opinion that Article 124 of the First Schedule of the

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Indian Limitation Act, 1908, does not apply in this case. Bhaiaji Thakur's suit was not a suit for possession of an hereditary office. Jharula Das had not taken possession of an hereditary office. The office of shebait of the temple was an hereditary office which could not be held by any one who was not a Brahmin panda. Jharula Das was not a Brahmin panda, he was of an inferior caste, and was not competent to hold the office of shebait of the temple, or to provide for the performance of the duties of that office. The appropriation from time to time by Jharula Das of the income derivable from the 3½-annas share did not deprive Musammat Grihimoni or, after her death, Bhaiaji Thakur, of the possession of the office of shebait, although that income was receivable by them in right of the shebaitship. The right to the office of shebait did not arise from, or depend upon, the receipt of a share of the surplus daily income from the offerings to the temple, although the right to receive daily a share of the net income from the offerings to the temple was attached to and dependent on the possession of the right to the shebaitship. Unless the shebaits received their share of the daily net income from the offerings, it does not appear how the ministrations of the temple could be provided for. By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings Jharula Das acquired no title and no right to a share of that income. On each occasion upon which Jharula Das received and wrongfully appropriated to his own use a share of the income to which the shebait was entitled, Jharula Das committed a fresh actionable wrong in respect of which a suit could be brought against him by the shebait. But it did not constitute him the shebait for the time being or affect in any way the title to the office.

The appellants here are entitled to have the decree of the High Court so far as it relates to the 3½-annas share, and to the costs in the High Court and in the Court of the Subordinate Judge varied by setting aside that part of the decree of the High Court which relates to the 3½-annas share and those costs, and by giving them a decree for all the costs in the High Court and in the Court of the Subordinate Judge, and a declaration that Bhaiaji Thakur was at the date of the suit entitled to the 3½-annas share of the net daily income of the offerings to the temple. Their Lordships will advise His Majesty accordingly.

The respondent must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants: *Barrow, Rogers & Nevill.*

Solicitors for the respondent: *T. L. Wilson & Co.*

J. V. W.

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

1914

Jan. 30.

AMULYA RATAN SIRCAR

v.

TARINI NATH DEY.*

Occupancy Holding—Non-transferable occupancy holding, whether devisable by will—Bengal Tenancy Act (VIII of 1885) ss. 26, 178 sub-s. (3) cl. (d)—Heir, if estopped by testator's act from claiming inheritance under the statute.

A non-transferable occupancy holding cannot be the subject of a valid testamentary disposition. In the case of a testamentary devise of such a holding, the heir-at-law is not debarred by the doctrine of estoppel from questioning its validity.

Hari Das Bairagi v. *Udoy Chandra Das* (1) not followed.

SECOND Appeal by Amulya Ratan Sircar, the plaintiff.

This case arose out of a conflict of title between two tenants each claiming occupancy rights in the land in dispute. The following are the admitted facts of the case. The land in suit formerly formed part of one holding standing in the name of one Tarapada Chatterji, a Christian, who died in 1894 leaving one heir, his widow Krishto Moni. At his death Tarapada left a will appointing as his executors the Secretary and Treasurer of the District Committee of the London Missionary Society. In 1903 Krishto Moni sold this land in suit to one Beni Madhab Ghose who sold to

*Appeal from Appellate Decree, No. 2740 of 1911, against the decree of J. C. K. Peterson, District Judge of 24-Parganas, dated July 26, 1911, reversing the decree of Khagendra Nath Bose, Munsif of Alipore, dated Sept. 30, 1910.

(1) (1908) 12 C. W. N. 1086 ; 8 C. L. J. 261.

one Martha Mandal who sold to the plaintiff, Amulya Ratan Sircar. In 1908, the defendants Tarini Nath Dey and others purchased the land in suit from the executors of the late Tarapada. According to the plaintiff's case the defendants dispossessed him in 1909, and he sued for recovery of possession upon a declaration of his title and for mesne profits. The first Munsif of Alipore decreed the plaintiff's suit, but on appeal that decision was reversed. Hence this second appeal to the High Court by the plaintiff.

Babu Girija Prasanna Roy Chowdhury, for the appellant.

Babu Jyotish Chandra Hazra, for the respondents.

MOOKERJEE AND BEACHCROFT JJ. The subject matter of the litigation which has culminated in this appeal, is one half share of an occupancy holding, which admittedly belonged at one time to Tarapada Chatterjee. The right to this one half share is claimed, on the one hand, by the transferee from the heir-at-law who is the plaintiff, appellant, and on the other hand, by the transferees from the executor who are the defendants respondents. The occupancy holding, it is not disputed, is not transferable by custom or local usage. In so far as the plaintiff is concerned, his transfer from the heir-at law has been recognised by the landlord, and no question can arise as to its validity on that ground. The substantial question in controversy is, whether the testamentary disposition was valid and operative so as to exclude the heir-at-law, because if there was a valid testamentary devise, the property passed to the executor, and the heir-at-law consequently took nothing. On behalf of the defendants respondents, it has been contended that the occupancy holding, though not transferable

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by custom or local usage, may be the subject of a valid testamentary disposition. The Bengal Tenancy Act admittedly does not contain any provision expressly applicable to this subject. But our attention has been drawn to section 26 which regulates the devolution of occupancy right when a ryot dies intestate, and it has been argued that the Legislature has herein, by implication, indicated that a raiyat is competent to make a testamentary disposition of his occupancy right. There is clearly no force in this contention. In the first place, if we were to accept the mode of interpretation of section 26 suggested by the respondents, we would have to contravene the elementary rule of construction that rights cannot be conferred by mere implication from the language used in a statute; there must be a clear and unequivocal enactment: *Arnold* v. *Mayor of Gravesend* (1).

In the second place, full effect would be given to the implication contained in section 26, if it were shown that a raiyat is competent to make a testamentary disposition of his right of occupancy in certain events. Now, section 178, subsection (*3*), clause (*d*) indicates that in this respect the right of an occupancy raiyat stands on the same footing as his right to transfer his holding. Clause (*d*) provides that nothing in any contract made between a landlord and a tenant after the passing of the Act shall take away the right of a raiyat to transfer or bequeath his holding in accordance with local usage. In the case before us, no local usage has been proved and the respondents are not in a position to support the validity of the bequest as made in accordance with a local usage. The respondents have consequently been driven to take up a different position. Their contention is that the heir-at-law is estopped from questioning the validity of the

(1) (1856) 2 K. & J. 574, 591; 110 R. R. 372.

devise made by the testator, and in support of this view reliance has been placed upon the judgment of Mr. Justice Doss in the case of *Hari Das Bairagi* v. *Udoy Chandra Das* (1). It may be conceded that the view taken by that learned Judge does support the argument for the respondents. But it is worthy of note that when an appeal was preferred under the Letters Patent against the decision of Mr. Justice Doss, the decree was affirmed on a different ground: *Udoy Chandra Das* v. *Hari Das Bairagi*(2). It is consequently impossible for us to treat the matter as concluded by authority, although the opinion expressed by Mr. Justice Doss must be deemed entitled to the highest consideration. On behalf of the appellant, the correctness of the view taken by Mr. Justice Doss has, however, been controverted; and we have been invited to examine the grounds upon which that opinion is based.

Mr. Justice Doss points out, in the first place, that a transfer of an occupancy holding is not a void transaction, that it is binding between the parties, namely, the transferor and the transferee, and all persons claiming through them, and that it is voidable only at the option of the landlord or his representative in interest. This view is founded on the doctrine of estoppel, which was clearly recognized by Phear, J. when he observed in *Bibee Suhodra* v. *Maxwell Smith* (3) that the raiyat "certainly could not himself recover it (the holding) from the stranger to whom he had transferred it for valuable consideration", and by Couch, C. J., when he remarked in *Narendra* v. *Ishan*(4) that "the raiyat could not recover possession from the transferee, as he would be bound by his act of

(1) (1908) 12 C. W. N. 1086; 8 C. L. J. 261.

(2) (1909) 10 C. L. J. 608.

(3) (1873) 20 W. R. 139.

(4) (1874) 13 B. L. R. 274, 289; 22 W. R. 22, 26.

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transfer." To the same effect is the express decision in *Bhagirath Changa* v. *Sheikh Hafizuddin*(1), where Stevens, J. pointed out that when the occupancy raiyat has transferred his holding on the representation that he had a transferable interest therein, he cannot, on principles of equity and good conscience, be permitted to prove against the transferee who had paid consideration for the transfer, that he had no transferable interest to convey. This is an intelligible principle, recognized so long and so firmly established that its soundness cannot now be successfully challenged. Mr. Justice Doss then concludes that if this is the character of the transaction, namely, the character of a voidable transfer, "it seems to follow that the heir of an occupancy raiyat ought to be held bound by a transfer of the holding made by a will." The learned Judge then proceeds to state the reason for this inference, namely, that if the heir is bound by a transfer for valuable consideration or by a gift, there does not seem to be any reason why he ought not to be held bound by a transfer made by a will. Before we test this reasoning, it is necessary to observe that the broad proposition that the heir of an occupancy raiyat is bound by a gift made by the raiyat himself may, when occasion arises, require examination. Cases are no doubt conceivable where the donee may, by the acceptance of the gift, have altered his position, and may, in such circumstances, be entitled to rely upon the doctrine of estoppel in support of his title. To take a concrete illustration: A is offered two gifts by two of his relations, on the condition that if he accepts one, he must renounce the other; he makes his election in favour of one of the gifts. His position would be altered if that donor were permitted thereafter to prove against him that the donor had no transferable

(1) (1900) 4 C. W. N. 679.

title to convey. But, on the arguments addressed to us, we are not prepared at present to accept it as an invariable principle of law that, in every case of gift, the doctrine of estoppel may be applied as between donor and donee. Let it be assumed, however, for the purposes of the present argument and for that purpose alone, that in all cases of transfer for valuable consideration as also in all cases of gift, the heir is bound by the same estoppel as the transferor or the donor himself; does it follow that this principle is applicable to cases of testamentary devise? In the case of transfer *inter vivos*, with or without consideration, there is, on the assumption made, an estoppel in favour of the transferee as against the transferor, and that estoppel is binding upon the heir of the transferor. In the case of a testamentary devise, is there any estoppel as between the testator and the intended legatee or the executor? It cannot be disputed that it is open to the testator, up to the very last moment of his life, to change his mind, and to revoke the disposition made by him. His testament does not come into operation till the moment after his death. Consequently, as between the testator on the one hand and the legatee or executor on the other, there is no room for any possible application of the doctrine of estoppel. The position becomes plain when we recall to mind the nature of the estoppel applicable to cases of transfer for consideration.

The principle is stated lucidly by Lord Denman in *Pickard* v. *Sears* (1) in the following terms: "where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things

(1) (1837) 6 A. & E. 469 : 45 R. R. 538.

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as existing at the same time." The principle was amplified and re-stated by Lord Selborne in the *Citizen's Bank of Louisiana* v. *The First National Bank of New Orleans*(1) in these terms: "The foundation of that doctrine, which is a very important one and certainly not one likely to be departed from, is this, that if a man dealing with another for value makes statements to him as to existing facts, which being stated would affect the contract, and without reliance upon which or without the statement of which the party would not enter into the contract and which being otherwise than as they were stated would leave the situation after the contract different from what it would have been if the representations had not been made, then the person making those representations shall, so far as the powers of a Court of Equity extend, be treated as if the representations were true and shall be compelled to make them good." Lord Selborne then proceeded to add a very important qualification,—"but those must be representations concerning existing facts"—and thereby emphasised the statement of Lord Cranworth in the case of *Jorden* v. *Money*(2) to the effect that in order to found an estoppel, the representation must be of existing facts and not of mere intentions. It is clear, therefore, that as between the testator on the one hand and the executor or legatee on the other, there is no estoppel. Consequently, so far as the heir-at-law is concerned, he cannot be deemed bound by any derivative estoppel traceable to an estoppel which bound his ancestor. If he is to be bound by any estoppel, it must be an independent estoppel against him; but on behalf of the respondents no intelligible principle of justice, equity or good conscience has been suggested upon which any such independent estoppel can be reasonably founded.

(1) (1873) L. R. 6 H. L. 352, 360. (2) (1854) 5 H. L. C. 185.

The truth is that the testament, if it takes effect, comes into operation immediately after the death of the testator; at the same moment, precisely, the statutory right of inheritance comes into operation; and there is no reason why an estoppel should be applied against the heir-at-law so as to deprive him of what he is entitled to take under the statute. We are thus constrained to hold that the view taken by Mr. Justice Doss cannot be supported on principle, and that in the case of a testamentary devise of a non-transferable occupancy holding, the heir-at-law is not debarred by the doctrine of estoppel from questioning its validity. In the case before us, the result follows that there was no valid disposition in favour of the executors. The plaintiff, as the transferee from the heir-at-law by successive devolution, is consequently entitled to the property claimed, in respect whereof the defendants are trespassers in the eye of the law.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Court of appeal below.

G. S. *Appeal allowed*

APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C.J., and Stephen J

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May 19.

HANNAH

v.

JUGGERNATH & CO.*

Trade-mark—Title—Assignment—Trade-mark in selection of natural products as indicating quality—Goodwill—License to use trade-mark—Action for royalty—Estoppel—Licensee estopped from questioning validity of license—Evidence Act (I of 1872), s. 117—Damages, action for.

In India the law of trade-marks is not governed by statute, there being no statutory system of registration. Rights and liabilities in connection with trade-marks are determined by reference to the principles of the Common Law of England.

British American Tobacco Co., Ld. v. *Mahboob Buksh* (1) referred to.

A trade-mark cannot be transferred or descend in gross, but only together with the goodwill of the business to which it relates.

A trade-mark represents the origin of the goods to which it is attached or their trade association : the truth of the representation is essential. By usage, successors in business may use their predecessors' trade-marks where the representation still continues to be substantially true.

A selector of natural products like jute may have a trade-mark in connection with such selection, as indicating good quality.

Major Brothers v. *Franklin & Son* (2) followed.

Meaning of " goodwill " explained.

Inland Revenue Commissioners v. *Muller & Co.'s Margarine, Ld.* (3) referred to.

In a suit for royalty, brought by the licensors of certain jute trade-marks against the licensees, the defence taken was that the plaintiffs had no title to the marks in question, and that the license was void :—

Held, that by virtue of s. 117 of the Evidence Act the licensees were estopped from questioning their licensors' title or the validity of the

* Appeals from Original Civil Nos. 58, 65 and 66 of 1913, in Suit No. 932 of 1912.

(1) (1910) I. L. R. 38 Calc. 110. (2) [1908] I. K. B. 712.
(3) [1901] A. C. 217, 223.

license. At any rate s. 117 cast on the defendants the burden of proving that the goodwill of the business had not passed to the plaintiffs to support the transfer of the trade-marks, and the defendants having failed to do so the plaintiffs were entitled to the royalty claimed.

Claim to damages by the licensors for depreciation in the value of the trade-marks due to the default of the licensees, refused on the facts of the case.

The decision of IMAM J. in *Jagarnath & Co.* v. *Cresswell and Others*(1) affirmed.

APPEALS by the defendants C. S. Hannah and C. L. Smallwood of Haworth & Co., E. C. H. Cresswell and H. A. Smyth of Moran & Co., and G. Watson also of Moran & Co., and cross-objections by the plaintiffs Juggernath & Co., from the judgment of Imam J. (1).

These appeals arose out of a suit for damages for breaches of covenants in respect of certain jute marks assigned by the plaintiffs to Moran & Co,, and subsequently assigned by the latter to Haworth & Co., and for payment of royalty in respect of these marks.

The facts which are fully set out in the report of the case in the Court of first instance and the judgments of Imam J., and the Appellate Court, are briefly as follows: one Surju Coomar Chatterjee who carried on business as a jute baler was the original owner of seven trade marks in connection with his business. After successive assignments to various parties, these marks were assigned to the plaintiffs for the sum of Rs. 1,90,000 on the 3rd April 1908. On the 24th September 1910, the plaintiffs gave a license in respect of four out of the seven marks to Moran & Co., for the period of one jute season, that is up to June 30th 1911. On the expiration of that period a second license was obtained by Moran & Co. from the plaintiffs by a deed of agreement dated 8th July 1911, for a period of three jute seasons extending up to June 30th 1914.

(1) (1913) I. L. R. 40 Calc. 814.

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The annual royalty for the use of the marks was fixed at Rs. 23,500. By an indenture dated the 1st March 1912, Moran & Co., with the concurrence of the plaintiffs, transferred to Haworth & Co. their rights in respect of the marks under their license, Haworth & Co. agreeing on their part to pay the royalty and to perform and observe the covenants and stipulations contained in the license. All the successive assignments purported to assign the goodwill of the business together with the marks.

In the jute trade, marks have been and are largely employed as an assurance of quality, and certain groups of marks were established and recognised for the purpose, including notably the six marks and eight marks groups. These trade groups were recognised by the London Jute Association as representing certain standards of quality and the four marks in suit were deemed to be of the standard of the six marks group.

On the 8th May 1912, the London Jute Association adopted their own "Association groups," and in none of these groups, did the four marks in suit appear. But it is to be observed that the six and eight marks trade groups continued to subsist, and dealers continued to enter into contracts on the basis of these trade groups.

On the exclusion of the four marks in suit from the "association groups", Haworth & Co. and Moran & Co. repudiated their agreements: thereupon the plaintiffs instituted this suit on the 5th September 1912 claiming Rs. 3,50,000 as damages for depreciation of the trade-marks resulting from breaches of covenants by the defendants alleging that the exclusion had been caused by such breaches, and Rs. 23,500 as royalty for the Jute season 1912-1913.

On the 7th April 1913, Imam J. disallowed the claim for damages for depreciation, but passed a decree

for Rs. 23,500 against all the defendants, in respect of the claim for royalty.*

From this judgment the present appeals were preferred and cross-objections laid.

Mr. S. P. Sinha (with him *Mr. W. Gregory*), for the appellants C. S. Hannah and C. L. Smallwood. *Mr. Buckland* (with him *Mr. Langford James*), for the appellants E. C. H. Cresswell and H. A. Smyth. *Mr. Avetoom* (with him *Mr. Hyam*), for the appellant G. Watson.

Mr. H. D. Bose (with him *Mr. B. C. Mitter* and *Mr. A. N. Chaudhuri*), for the respondents, Juggernath & Co.

Mr. Sinha. The decree for Rs. 23,500 by way of royalty should be set aside; the plaintiffs were not entitled to any royalty, as they had no legal title to the marks in suit. The marks were not trade-marks, but merely quality marks, that is, they were merely indicative of a certain standard of quality, and hence not assignable: *Vadilal* v. *Burditt & Co.* (1). The marks could not be the subject of property, and could be used by anyone; there would be total absence of consideration. They are not distinctive of the business of any particular trader. At the time of the assignment by the widow of S. C. Chatterjee, there was no goodwill of the business: thereafter the marks lost their distinctive significance: *see* Kerly on Trade Marks, 4th edition, pages 38, 394, 405. It is for this reason, that *Hall* v. *Burrows*(2) is distinguishable: see *Leather Cloth Company* v. *American Leather Cloth Company*(3), and on appeal(4), and *Reddaway* v. *Banham*(5). There is no evidence that these marks

* See I. L. R. 40 Calc. 814.

(1) (1905) I. L. R. 30 Bom. 61, 74.

(2) (1863) 4 De G. J. & S. 150.

(3) (1863) 4 De G. J. & S. 137.

(4) (1865) 11 H. L. Cas. 523.

(5) [1896] A. C. 199, 209.

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were trade marks at Common Law, that is, by user and reputation.

[JENKINS C. J. referred to *Saxton* v. *Dodge* (1).] Assuming that the marks were trade-marks, if they were personal, they would clearly be not assignable: If they were trade-marks in connection with a business, then they would be assignable only if the goodwill of the business were also transferred: see Sebastian on Trade-marks, 5th edition, p. 116. The form of the successive assignments, purporting to assign the goodwill together with the marks, was a mere verbal compliance with the rule—there was no reality in it: from the evidence it is clear that the business of S. C. Chatterjee which had ceased to exist, was in fact not carried on by the successive assignees: the assignments were in reality in gross and hence void and inoperative: *British American Tobacco Co., Ld.* v. *Mahboob Buksh* (2), *Thorneloe* v. *Hill* (3). Assume that the marks had not ceased to be distinctive, they would connote the manufacture or selection of S. C. Chatterjee or his successors in business: would this be a correct description of a baler holding under a license? It is submitted the license involved a fraudulent misrepresentation. License of a trade-mark involves an assignment in gross and is either meaningless or illegal: see Sebastian on Trade Marks, 5th edition, p. 607 sec. 70, p. 629 sec. 87, Kerly on Trade-marks, 4th edition, p. 394, citing *Oldham* v. *Jones* (4), *In the matter of Roger's Trade-mark* (5). Further in the present case, the plaintiffs purported to give a license of four out of seven trade-marks: this was clearly an assignment in gross. Lastly looking at the plaint it is obvious paragraph 3 refers

(1) 57 Barb. 84.
(2) (1910) I. L. R. 38 Calc. 110.
(3) [1894] 1 Ch. 569.
(4) 13 Ir. Ch. 393: (1862) 14 Ir. Ch. 81.
(5) (1895) 12 R. P. C. 149, 158.

to the marks as quality-marks and not as trade-marks, and paragraph 4 was an attempt to take the marks outside the ruling in *British American Tobacco Co.* v. *Mahboob Buksh* (1).

Mr. Buckland adopted Mr. Sinha's argument.

Mr. Avetoom adopted Mr. Sinha's argument and admitted that Mr. Watson would be in the same position as the other defendants for royalty payable subsequent to April 1st, the date of his entry into partnership with Moran & Co.

Mr. B. C. Mitter. The true reason that the defendants repudiated the assignments was not that they considered the practice a fraud on the public, but because the marks had not been included in the "Association Groups" of the London Jute Association, and hence the value of the marks had depreciated. They had previously enjoyed the benefits of the assignment. It was not suggested either in the written statements or the grounds of appeal that there was no consideration. The assignments describe the marks as trade-marks. The defendants who are licensees are estopped from denying the title of the licensor, or the validity of the license in the present action for royalty: see sec. 117, Evidence Act, Bigelow on Estoppel, 6th edition, p. 598, Terrell on Patents, 5th edition, p. 205. It is submitted these marks were trade-marks which were indicative of quality and also of the source from which the goods came. The practice of leasing these marks has been in vogue in the jute trade for thirty-three years, and it is submitted this trade-usage will be upheld by the Court and will be regarded as a further extension on the Common Law incidents of trade-marks.

(1) (1910) I. L. R. 38 Calc 110.

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[JENKINS, C. J. referred to *Atwood* v. *Sellor & Co.* (1).]

In view of the usage being well established, there can be no possibility of deception on the public. A trade-mark is property and the only restrictions to its transmission is, that the business should also be transmitted, and the transmission should not operate as a deception on the public: see *Hall* v. *Barrows* (2), *Singer Manufacturing Company* v. *Loog* (3) "*Singer*" *Machine Manufacturers* v. *Wilson* (4), *Orr Ewing & Co.* v. *Johnston & Co.* (5), on appeal *Johnston* v. *Orr Ewing* (6), *Bourne* v. *Swan & Edgar Ld.* (7), *Edelsten* v. *Edelsten* (8). On the principle of the above cases the plaintiffs are clearly entitled to relief. Assuming that the marks are not trade-marks in law, it is clear the parties have considered them as property of very considerable value, and the appellants have used the marks and made profits.

[JENKINS, C. J. referred to *Chanter* v. *Leese* (9) *Edwards* v. *Dennis* (10), Kerly on Trade-marks 4th edition, p. 39.]

On the meaning of the "goodwill" of a business see Sebastian on Trade-marks, 5th edition pp. 333, 334, 335 & 343, also *Levy* v. *Walker* (11), *Sotter* v. *Commissioners of Inland Revenue* (12) and *Trego* v. *Hunt* (13). The case of *British American Tobacco Co.* v. *Mahboob Buksh* (14) is clearly distinguishable: there Kabasi retained the right of carrying on business in the name of the Hindustan Co.

(1) (1879) L. R. 4 Q.B.D. 342, 363.
(2) (1863) 4 De G. J. & S. 150.
(3) (1882) L. R. 8 A. C. 15, p. 33.
(4) (1877) L. R. 3 A. C. 376, 391.
(5) (1880) L. R. 13 Ch. D. 434.
(6) (1882) L. R. 7 A. C. 219.
(7) [1903] 1 Ch. 211, 225
(8) (1863) 1 De G. J. & S. 185.
(9) (1838) 4 M. & W. 295.
(10) (1885) L. R. 30 Ch. D. 454.
(11) (1879) L. R. 10 Ch. D. 436.
(12) (1854) 10 Exch. 147.
(13) [1896] A. C. 7, 17.
(14) (1910) I. L. R. 38 Calc. 110

[JENKINS C. J. referred to *Ex parte Saffery, In re Cooke* (1), on the proposition that the rules of the Jute Association would not bind outside parties.]

Mr. H. D. Bose (followed).

[JENKINS C. J. referred to *Major Brothers* v. *Franklin & Son* (2).]

Mr. Sinha, in reply. The reason that the marks have become valueless is, that they are now looked upon as merely quality marks. Assuming that the marks were trade-marks, a license is void see Kerly on Trade-marks, 4th edition, pp. 395, 467, 468, Sebastian 5th edition, p. 607. Though the assignments make mention of the transmission of the goodwill, the real object was the acquisition of the marks. It is significant that in none of the assignments, is there any reference to a single bale of jute, the books of the business, or subsisting contracts being transferred.

Mr. Langford James, in reply. If the marks are considered to be trade-marks, the assignment was vicious, and the onus is on the plaintiffs to shew it was not: *see* the argument of Moulton Q. C. in *Pinto* v. *Badman* (3). A license to use a trade-mark is bad; *a fortiori* a license to permit others to use the trade-mark is bad: per Lord Mansfield in *Holman* v. *Johnson* (4). The assignment being a fraud on the public and against public policy, the defendants must succeed.

On the cross-objections,

Mr. H. D. Bose, for the plaintiffs. The claim for damages against Haworth and Co. is not pressed. But it is submitted a decree for damages should have been made against Moran & Co. As a result of the breaches of clauses 4 and 7 of the covenants, there has been

(1) (1876) L. R. 4 Ch. D. 555, 561.
(2) [1908] 1 K. B. 712.
(3) (1891) 8 R. P. C. 181, 187.
(4) (1775) 1 Cowp. 341, 343.

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depreciation in the value of the marks: it is because the marks have become valueless that the defendants have repudiated their agreements. These marks were excluded in May 1912: it would have been enough if the plaintiffs had established lowering of the standard, without actual removal. The proof of the exclusion is that the marks were eliminated from the official groups. It was due to the default of the defendants, namely, bad packing, that the marks were so excluded —the proof is the award of considerable allowances. Hence the plaintiffs are entitled to damages. The action for damages is maintainable at the present stage, as the defendants have repudiated their obligations under the assignments. It is true, that although excluded by the London Association the marks are still in existence within the six marks group and there is nothing to prevent a person from purchasing the 3 S mark, if he desires to do so. But not being within the Association groups, buyers are more critical: 96 per cent. of the contracts are now under the London association groups. Moreover the scale of allowances for marks not within the London Association groups is much higher, as they are treated as substitution marks. All this shews that there has been a great fall in the value of the marks. It is the duty of the defendants to have the marks "reinstated": this can be done only at considerable cost. It will be contended by the defendants that clauses 4 and 7 referred not to the official groups but the trade groups, and that inasmuch as the marks are still tenderable under contracts for six marks and eight marks groups, there has not been exclusion. But it is submitted that the fact of exclusion from the official groups establishes that these marks are not approved or recognised by the Association to the same extent as they were, as the official groups include

such marks as have maintained a proper standard of quality. The depreciation and loss are due to the default of the defendants and the measure of damage will be the difference between the price paid by the plaintiffs for the marks, and the price they would now fetch: *Conquest* v. *Ebbetts* (1).

Mr. Langford James. The claim for damages shows up the viciousness of the system of licenses of these marks. It comes to this that the licensors allow the licensees to deceive the public for a certain period, and if the latter do so badly, the licensors claim damages, as they would be unable to permit others to continue the deception. It is submitted that after the decision in *British American Tobacco Co., Ld.* v. *Mahboob Buksh* (2), and the London Association's official grouping, none of these marks are of any commercial value. The main contention on behalf of the defendants is, that clauses 4 and 7 referred to the trade groups, that is, the six marks and eight marks groups and not to any London Associations official groups. The trade groups and the official groups are quite distinct. Even after the institution of the official groups, the trade groups continued to subsist, and the marks in suit still find their place in these trade groups. Hence there has been no breach of covenant. The 3 S mark still has a ready sale, and with proper packing can become included in the official group. Lastly, the defendants have determined the license by repudiation, and are now in a position to challenge the title of the plaintiffs: if it is contended, the repudiation has not been accepted, the answer would be, that, in that case, this action for damages is premature. The damages in any event would be nominal.

(1) [1896] A. C. 490. (2) (1910) I. L. R 38 Calc. 110.

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Mr. Avetoom, for Watson. It is admitted that the damage to the marks, if any, was suffered before this defendant became a partner of Moran & Co. It follows, this defendant, would in any event not be liable: See section 249 Contract Act. There is nothing to shew this defendant derived any profit from the marks.

Mr. H. D. Bose, in reply. With reference to Watson the partnership agreement refers to and contemplates claims under the license. On the whole case my argument is three-fold:—(*i*) the license was with reference to the London official groups; (*ii*) if it be held that the license referred to the trade groups, then the term "removed" would include the contingency of official groups being instituted, from which these marks were excluded: (*iii*) in any event, the exclusion of these marks would amount to "non-recognition" by the London Jute Association. Whichever of these views is taken, the injury having accrued owing to the default of the defendants, the plaintiffs are entitled to damages.

Cur. adv. vult.

JENKINS C.J. The plaintiffs, Messrs. Juggernath & Co. are described in the heading of the plaint as a firm carrying on business as jute balers and shippers and merchants at No. 117, Harrison Road, in the town of Calcutta.

The defendants are E. C. H. Cresswell, H. A. Smyth, and Geoffrey Watson, who carry on business in co-partnership as Jute Balers, Brokers, and Merchants, under the name of Messrs. Moran & Co. at 11, Lall Bazar Street, Calcutta, and G. S. Hannah and C. L. Smallwood, who carry on business in co-partnership as Jute Balers, Brokers and Merchants under

the name of Messrs. W. Haworth & Co. at No. 1, Mission Row. It is alleged in the plaint that the plaintiff firm has been and is the proprietor of four jute trade-marks set forth in the schedule, and the plaintiff's case is that on the 8th of July 1911 the defendants Moran & Co. and on the 1st of March 1912 the defendants Haworth & Co. acquired the right to use and permit the use of these trade marks, and that in return the defendant firms severally covenanted to maintain the reputation of these marks and to pay an annual fixed royalty of Rs. 10,000 in cash, and Rs. 13,500 in bills. These agreements were repudiated by Haworth & Co. on the 2nd July and by Moran & Co. on the 15th August 1912; and the plaintiffs, without assenting to these repudiations have instituted this suit on the 5th September 1912, claiming Rs. 3,50,000 as damages on account of the alleged depreciation of the trade marks, and Rs. 10,000 in cash, and the execution of three several drafts for the aggregate sum of Rs. 13,500 for and by way of royalty for the jute season 1912-13, or in the alternative Rs. 23,500 as damages.

All the defendants have resisted the claim, and the suit has been heard by Iman J. who disallowed the claim for damages for depreciation, but passed a decree for Rs. 23,500 in respect of the claim for royalty.

Against this judgment three separate appeals have been filed one by Haworth & Co. a second by Cresswell and Smith, and a third by Watson.

The plaintiffs have on their side taken cross-objections. These several appeals and cross-objections have been heard together and will be determined in one judgment.

All the appellants advance one common ground of appeal; that the plaintiffs had no title to the alleged trade marks, that they passed no interest to the

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defendants, and that there is no legal consideration for the obligation attributed to them. Watson makes the further point that, having regard to the date of his becoming a partner in Moran & Co. April 1912, he came under no liability. This plea, however, was expressly limited by Counsel before us to the claim for damages, and was not put forward as an answer to the claim for royalty.

We will first trace the title to the alleged trade marks asserted by the plaintiffs.

It is said that these marks were originated by Surju Coomar Chatterjee, who carried on business, presumably in Calcutta, as a jute-baler until his death in 1893, under the two names of S. C. Chatterjee and of M. N. Chatterjee. Apart from subsidiary dealings by way of mortgage and so forth, it is sought to establish the devolution of these marks to the plaintiffs as follows:—

On the 24th September 1904 Surju Coomar Chatterjee's widow purported to assign to Landale and Morgan, a firm of jute brokers and agents, seven marks, including the four in suit, and also the goodwill of the business of jute balers formerly carried on by Surju Coomar Chatterjee, the consideration being Rs. 75,000.

On the 26th September 1904 Landale and Morgan in consideration of Rs. 85,000 assigned to Dooli Chand, a baler and dealer in jute trading under the style or firm of Harsook Das Dooli Chand, these seven marks and the good-will of the firm of Landale and Morgan "of, into, upon or concerning the said business of jute balers formerly carried on by the said S. C. Chatterjee deceased and thereafter by the firm in succession thereto and the sole and exclusive right to use the said trade-marks or brands mentioned and described in the schedule hereunder written and the

name of the said S. C. Chatterjee in connection with the said business and to bale jute cuttings, jute rejections and all other kinds of jute with and under such marks or brands and name and all the estate, right, title and interest of the firm therein."

On the 8th of May 1907 Doolichand purported to assign the trade-marks and the business of Surju Coomar Chatterjee to Gocul Chand Khettan for Rs. 3,50,000 and on the 3rd of April 1908 Gocul Chand Khettan purported to make a similar assignment to the plaintiffs for Rs. 1,90,000.

On the 8th July 1911 the plaintiffs in their turn executed an exclusive license for the period between the date of the instrument and the 30th June 1914 in favour of Moran & Co., of these four trade-marks, and it was thereby agreed that the licensees should and might at all times during the term peaceably and quietly use or employ or permit or authorise others to use or employ, exclusively, the trade-marks, and to hold the goodwill of the business of Surju Coomar Chatterjee, the original baler of the marks as far as any of the marks were concerned without any lawful interruption or interference by the proprietors. On the 1st of March 1912 the licensee's rights were assigned to Haworth & Co.

In India the law of trade marks is not governed by statute: there is no statutory system of registration, and the rights and liabilities in connection with trade-marks are determined by reference to the principles of the Common Law of England: *British American Tobacco Co.* v. *Mahboob Buksh* (1).

It is thus established that a trade-mark cannot be assigned or descend in gross; and this rests on no arbitrary rule, but is a necessary consequence of the

(1) (1910) I. L. R. 38 Calc. 110, 117.

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inherent nature of a trade-mark, for it is a mode of representing the origin of the goods to which it is attached, or their trade association, and the truth of the representation is essential.

In its strictest meaning the representation of a trade-mark may perhaps only be true of its originator, but usage has sanctioned a more liberal treatment based on the principle of identification by succession.

And so successors in business have been allowed to use their predecessor's trade-marks where the representation still continues to be substantially true.

Can it then be said within the permitted limits of deviation from strict accuracy, that the plaintiffs are entitled to the trade mark in suit?

It must, we think, be taken that Surju Coomar Chatterjee was entitled to those trade-marks, and it is no obstacle in the way of that view that the subject of the marks was a natural product, and he was merely their selector, who certified to their good quality: *Major Brothers* v. *Franklin & Son* (1). Nor do we think that it has been shown that the marks were so personal to the originator as to be inalienable.

Surju Coomar Chatterjee carried on the business of a baler. He died in September 1893, and the books of the Calcutta Baled Jute Association indicate that his marks continued to be used from the time of his death. This doubtless was with the authority of his successors, but whether there was such a disposition of the goodwill of the business as would be necessary to support this authority, does not appear till 1904.

In that year we have the assignment by the widow in favour of Landale and Morgan, to which we have already referred.

This and each succeeding assignment is expressed to be a transfer not only of the trade-marks, but, also

(1) [1908] 1 K. B. 712.

of the business of jute balers formerly carried on by Surju Coomar Chatterjee. In form, therefore, there has been compliance with the rule that a trade-mark can only be assigned together with the good will of the business to which it relates.

But is this merely a formal compliance without any reality, a mere device which ought not to be recognised as satisfying the conditions on which a successor is entitled to use a trade-mark he did not originate? For the appellants it is contended that it is, and in support of this, much and persistent reliance has been placed on an argumentative but unhappily worded paragraph in the plaint (paragraph 4).

Any one who attempts to express his meaning in a single sentence twenty-seven lines in length runs the risk of being misunderstood, and the author of this paragraph has not escaped the common fate. It is possible that the paragraph was an attempt to escape from the result of the decision in *British American Tobacco Co., Ld.* v. *Mahboob Buksh* (1), and was composed more in reference to that decision than to the actual terms of the several assignments. But whether that be so or not, there is no force in the argument that the actual terms of those assignments are affected by the argumentative statement in the plaint.

They in fact purport to transfer the goodwill of Surju Coomar Chatterjee & Co. "Goodwill," Lord Macnaghten has said, "is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its

(1) (1910) I. L. R. 38 Calc. 110.

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first start": *Inland Revenue Commissioners* v. *Muller and Co.'s Margarine, Ltd.* (1). Manifestly that which goes to form the goodwill would vary with the nature and conditions of the business. Certainly a transferee would be entitled to use the name in which the business was carried on and to represent himself as carrying on that business. This right passed under the several assignments, for, under their terms, each assignee became legally entitled to exercise these rights, and each assignor lost these advantages.

But then it is said that there is no evidence that any use was made of these rights, or that any assignee carried on the business in the name of Surju Coomar Chatterjee, and in particular that it is not shewn that Dooli Chand, who had a baling business of his own, kept this assigned business separate.

In dealing with these objections the character of this suit has to be borne in mind and the relations of the parties; it is not brought by one who claims to be the owner of a mark against a stranger for infringement: it is brought against two firms who are at any rate expressed to be licensees and purported to take in that capacity. And a licensee shall not be permitted to deny that his licensor had, at the time when the license commenced, authority to grant such license (Evidence Act Section 117).

The authority of the plaintiffs to grant the license under consideration depends upon whether they acquired a title to the trade-marks, and this they could not acquire in the circumstances of the case without an effective assignment of the business of Surju Coomar Chatterjee & Co.

This would seem to preclude the defendants from questioning the conditions on which the plaintiffs' authority rested, that is to say, the acquisition by

(1) [1901] A. C. 217, 223.

them of the business of S. C. Chatterjee & Co. and the trade-marks. The section is positive in its terms and we are bound to give full effect to it. Had the plaintiffs based their case on the licenses, and resisted any attempt to invalidate their title by a reference to its history, they would have been within the rights; and we cannot think that their case has been prejudiced by the mode in which it has been presented.

At any rate section 117 would cast on the defendants the burden of proving that the good will of the business had lost its separate existence by merger or otherwise, or had not passed to the plaintiffs, to support and justify the transfer of the trade-marks, and that the plaintiffs had not the authority they professed to exercise. This the defendants have not done.

On the contrary it has been urged for what it was worth that the association of the names M. N. Chatterjee & Co. and S. C. Chatterjee & Co. with the trade-marks itself involved carrying on business in the old name.

Had the defendants proved their allegation of misrepresentation on the plaintiffs' part, that would have seriously affected the value of the estoppel on which the plaintiffs rely.

But no such proof has been given and not one of the defendants has gone into the witness box.

Then it has been contended that the license was in gross and therefore was for an illegal consideration, or at any rate for no consideration, but the agreement purports to vest in the licensees a contractual right to the business. The illegality of the consideration has not been made out, nor can it be said that there was no consideration within the meaning of the Contract Act. From the amounts paid or agreed to be paid at different times, it is obvious that the marks were

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regarded as possessing considerable commercial value. Nor must it be forgotten that for the first year of its term the license was used and paid for and that as a result of the year's working this commercial value of the marks have been seriously depreciated. Though the leasing or assigning of trade-marks without a real transfer of an existing business is a nullity from a legal point of view and in fact deprives them of the characteristics to secure which they are recognized by law, yet we cannot in the circumstances of this case hold that as against the licensees the plaintiffs have not a good claim to royalty, and we agree with the conclusion at which Imam J. arrived. We only desire to add that no objection has been urged before us to the form in which the decree in respect of royalty has been passed, and we, therefore, refrain from discussing it.

While Imam J. decreed the payment of royalties, he dismissed the claim for damages, and to this the plaintiffs have taken a cross objection. They rely on clauses 4 and 7 of the agreement of the 8th July 1911, and allege that the defendants, Moran & Co., permitted jute to be packed under the marks which was inferior to the quality of the standard fixed by the London Jute Association for those marks or for the corresponding marks of the same group, or otherwise committed breaches of the rules and regulations of the London Jute Association by reason whereof the marks have been removed from the respective groups (plaint: paragraph 10).

This claim is now made against Moran & Co. alone, and not against Haworths, whose predicament in the litigation one cannot but feel to be unfortunate.

It is conceded by Moran & Co. that the marks were included in the London Jute Association groups for 1911, and not in those for 1912; but this, it is argued, is

a matter with which these clauses 4 and 7 have no concern. The argument requires an explanation.

In the jute trade, marks have been and are largely employed as an assurance of quality. This has led to the establishment of several groups, and among them the six marks group was of especial importance. As the title suggests, there were six marks in this group, and each mark was regarded as an assurance that the jute bearing it was up to the standard of a grade called "Firsts" in the trade. Later on the eight marks group was established, and this comprised these same six marks and two others that had acquired a reputation of merit. It would seem, however, that this eight marks group, though largely identical with the six marks group, was in fact an independent group; and so contracts were made on the basis of one or other of these two groups, or of other groups of marks; for there were many other groups, but with them we have no concern at present.

This then is how matters stood at the commencement of the jute season 1911-12 or in other words on the 1st July 1911.

At this time the London Jute Association had determined to establish its own groups of marks, and without attempting to explore the several reasons by which they had been influenced to this, it may be reasonably surmised that the vicious practice of leasing marks and the results of that practice had in some measure caused the mischief that this new departure was intended to counteract.

It was an easy mode of controlling the marks in use, if only the trade as a whole lent its support; at first apparently this support was somewhat feeble and contracts on the basis of the Association groups were few; but now they are an important, if not the principal, basis of jute dealings.

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This policy evidently had long been under consideration, but it did not take definite and announced shape until the 1st July 1911, when a circular was issued in the terms appearing in Exhibit No. 1 in this case.

When the London Jute Association thus established groups of their own, they adopted the marks then in use in the trade, and (among others) those of the six and eight marks groups.

There were rules regulating the inclusion or non-inclusion of marks in the Association groups, and some undoubtedly were more stringent than the trade conscience, which had previously regulated—so far as it can be said that there was any regulation—the recognition by the trade or the Association of the marks in use. I may illustrate this by the new rule that three penalties might involve the exclusion of a mark, a rule of the Draconian order, for it operated without reference to the volume of jute that might be baled under the mark, and disregarded the average standard of quality over the whole range of dealings.

Three failures in an otherwise excellent course of dealing might involve consequences from which a consistent course of inferior dealing would be exempt.

We point to this in no spirit of criticism; it is not our business or desire to criticise, but to emphasize the altered character of Moran's responsibility if the plaintiffs' reading of the clauses be accepted.

On the 24th September 1910, when the Association marks had not been established, the plaintiffs and Morans had entered into an agreement substantially the same as that now under consideration and containing provisions identical with the dark clauses 4 and 7 of the agreement of the 8th July 1911. This shews that at that time there was an apprehension of the risk of non-recognition against which the clauses were

directed. But *ex hypothesi* the risk was not of exclusion from the Association's groups, for they did not then exist. The risk must have been the non-recognition by the Association of the marks then in use by the trade, a risk which manifestly was not so urgent as that created by the new rules.

It was against this old risk, Morans contend, and not the new risk created in 1911, that the 4th and 7th clauses were aimed.

The plaintiffs see in this line of reasoning an attempt to construe a later by an earlier document; but this is hardly a complete statement of the position. It is rather an endeavour to place the Court in possession of the facts which, it may reasonably be said, were within the contemplation of the parties when the agreement of the 8th July was executed, and to shew that there were conditions apart from those created in 1911, to which, in the minds of the contracting parties, clauses 4 and 7 of that agreement could aptly be applied. This seems legitimate, and it becomes of considerable force when it appears that there is strong reason to believe that these new conditions could not have been known to the contracting parties or have been within their contemplation.

The circular of 1st July 1911 could not have reached Calcutta by the 8th in the ordinary course of mail, nor does it clearly appear that it was otherwise communicated to the parties prior to that date. This is important in considering what were the circumstances, that is the known circumstances at the time the agreement was made.

The phraseology of the two clauses too seems to us to aid the view that the risk contemplated and accepted did not extend to exclusion from the Association groups. The two clauses evidently refer to the

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same topic and they speak of the group of trade-marks which is recognised by the Association; but while the six marks group may be said to have been recognised at the date of the agreement, the Association groups were not recognised, but created and established. Mr. H. D. Bose, who has argued the whole case admirably on behalf of the plaintiffs, points to certain passages in Mr. Macleod's Evidence as supporting his contention that the Association has ceased to recognise the six marks group, and at one point there would seem to be some verbal justification for the argument. But it seems to turn on the precise force Mr. Macleod placed on the word "recognise," when under enticement of cross examination he gave an affirmative answer to a question implying that recognition had ceased. The Association then had their own groups and it would probably be correct to say that they did not recognise any other group as occupying the position it had in relation to them prior to the establishment of the Association group. But Mr. Macleod, we believe, is not so much a grammarian as a man of affairs, and passing from the abstract to the concrete, he declares that the six marks group can still be the subject of a contract under the prescribed London forms, and further that contracts on the basis of the six marks group enjoy the same facilities for arbitration, etc., as are enjoyed by contracts made under the official group. We attach more importance to the position thus disclosed by Mr. Macleod than to the terms of his reply to the question put to him in cross-examination.

Mr. Bose, however, has suggested that the advantage of a more favourable scale of allowances has now been lost, and that the 3 S marks are now no better than substitutes. That may be so where the contract is on the basis of the official group; but it had to be admitted that there was nothing to shew this was the

case where the contract is on the basis of the six marks group, as it still may be if the parties so desire.

It may be that the exclusion of the 3 S marks from the Association groups has depreciated the value of those marks in their own group, but as we read the clauses 4 and 7 this casts no responsibility on Morans' to indemnify the plaintiffs.

Morans' contention, therefore is, we think, well founded, and we hold that neither clause refers to exclusion from the Association groups of marks but only from the group of trade-marks recognised by the Association, as for example the six marks group. But apart from the Association groups, it is not alleged, and certainly is not proved, that there has been any omission or demission of the marks in suit, or any removal of them from the six marks group : in fact there is every reason to think that they still retain their place. So far we have dealt exclusively with the six marks group; but what we have said as to that applies equally to the other groups, for the case and the arguments have proceeded on the basis that what is true of the six marks group is, in the circumstances of this case, true of all groups in question other than the Association's groups.

And so we agree with the conclusion shortly and clearly stated by Imam, J. as to the plaintiff's inability to recover damages ; and in this view it is unnecessary to deal with Watson's separate contention that section 249 of the Contract Act protects him from any liability in connection with this claim for damages.

The result is that each of the several appeals, and also the cross-objections, must be dismissed.

By consent we make the order that each party do bear and pay his own costs of the several appeals and the cross-objections. We say nothing about the paper

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books. Costs may, if necessary, be taxed as between attorney and client.

STEPHEN J. I agree.

Appeals and Cross-objections dismissed.

Attorney for G. S. Hannah and C. L. Smallwood: *M. M. Chatterjee.*

Attorneys for E. C. H. Cresswell and H. A. Smyth: *Leslie & Hinds.*

Attorney for G. Watson: *G. G. Pearse.*

Attorney for Juggernath & Co: *S. C. Mookerjee.*

J. C.

APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

1914

May 28.

AMJADENNESSA BIBI

v.

RAHIM BUKSH SHIKDAR.*

Undue Influence—Contract—Illegal composition of non-compoundable offence —Stifling prosecution—Suit for refund—Contract Act (IX of 1872) ss. 16, 19.

No refund of money or return of security, given under agreement not to prosecute a criminal case, will be allowed unless circumstances disclose pressure or undue influence. Mere fear of punishment in a criminal case does not constitute undue influence.

Jones v. *Merionethshire Building Society* (1) referred to.

*Appeal from appellate Decree No. 97 of 1912, against the decree of Debendra Mohan Sen, Subordinate Judge of Tipperah, dated May 30, 1911, confirming the decree of Bipin Behari Ghosh, Munsif of Chandpur, dated April 28, 1910.

(1) [1892] 1 Ch. 173, 186.

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AMJADENNESSA BIBI v. RAHIM BUKSH SHIKDAR.

SECOND Appeal by Amjadennessa Bibi and others, the plaintiffs.

This appeal arises out of a suit for recovery of Rs. 680 alleged to have been paid by the plaintiffs to the defendants as compensation for compromising a criminal case. The learned Munsif who tried the suit dismissed it on the (among other) ground, that the consideration for the contract was unlawful and opposed to public policy.

The plaintiffs, then, appealed to the Subordinate Judge who, agreeing with the Munsif, disallowed the appeal. Hence this second appeal.

Babu Rajendra Chandra Guha, for the appellants.
Babu Satish Chandra Ghose, for the respondents.

HOLMWOOD AND CHAPMAN JJ. The only point raised, in this second appeal, is that the agreement really having been *in invito*, a refund suit can be maintained in Court. We have only to point out that neither the pleadings nor any issue, nor any finding of the lower Courts, nor apparently any evidence appears in support of the question of fact that there was any pressure upon the plaintiff to pay this money in consideration for not being prosecuted. The so-called admission of the defendants, in their written statement, goes directly to the contrary.

It is urged that in every case the fear of punishment is an undue influence and that if the defendant accepts money to screen the plaintiff from punishment he thereby exerts this undue influence. Of the exceptions given by Pollock, the one on which alone reliance is placed is "unless the agreement was made under such circumstances as between the parties that if otherwise lawful it would be voidable at the option of the party seeking relief". It is obviously not voidable under section 19 inasmuch as there was

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no coercion whatever, and we are unwilling to read into section 16 a fictitious use of the dominant position of the defendant. The law says that not only the defendant must have a dominant position but he must use it, and this has been carefully guarded in all the cases in England to a number of which we have been rather unnecessarily referred. The rule derivable from these cases can be thus stated: If money or security be given under an agreement not to prosecute under such circumstances that there has been pressure or undue influence, the transaction will be set aside and the money or security ordered to be returned. There is one rather doubtful passage in the judgment of Lord Justice Bowen in the case of *Jones* v. *Merionethshire Building Society* (1), which might be taken to extend the principle further; but the learned Judge expressed himself with extreme hesitation and abstained from expressing any opinion on it. Were we to extend the principle in the way we are asked to do by the learned vakil for the appellant, it is perfectly clear that in every case of illegal composition of a non-compoundable criminal offence a refund can be demanded at law. We have no desire and no intention to extend the law to any such result. It has been held that section 65 does not apply to a case of this kind.

The appeal is, therefore, dismissed with costs.

S. K. B. *Appeal dismissed.*

(1) [1892] 1 Ch. 173, 186.

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

MADHU SARDAR

v.

KHITISH CHANDRA BANERJEE.*

1914

May 26.

Insolvency—Interim Receiver—Insolvent's money, attachment of, before the adjudication order—Provincial Insolvency Act (III of 1907), s. 13, cl. (2), s. 16, cl. (6) s. 34, cl. (1)—Bankruptcy Act of 1883 (46 & 47 Vict. c. 52), s. 40.

An *interim* receiver is appointed for the protection of the estate of the debtor for the benefit of the entire body of creditors.

Ex parte Fox (1) referred to.

Clause (*1*) of s. 34 of the Provincial Insolvency Act restricts the operation of s. 16, clause (*6*) thereof.

A creditor, who had attached a sum of money due to the insolvent before his estate vested in the receiver appointed after the adjudication order, is entitled to apply it exclusively in satisfaction of his debt.

APPEAL from Original Order by Madhu Sardar and another

One Khitish Chandra Banerjee carried on the business of a railway contractor at Damukdia up to November 1910 under the authorities of the E. B. S. Railway, his head office being at Beliaghatta, 24-Parganas, where he resided. For the purposes of his business he had to advance large sums of money to persons who absconded and had to close his business in consequence.

On the 1st August 1912, he applied to the District Judge of 24-Perganas to be adjudicated an insolvent.

* Appeal from Order No. 8 of 1913, against the order of H. P. Duval, District Judge of 24-Perganas, dated Sep. 30, 1912.

(1) (1886) L. R. 17 Q. B. D. 4.

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The order was made on the 30th September 1912. In the meantime an *interim* receiver had been appointed. Notice was issued at the same time to the Examiner of Accounts of the E. B. S. Railway to pay into Court what was due from the Railway authorities to the insolvent. But this sum had already been attached in execution of a decree obtained by the appellants against the applicant in insolvency and paid into the Court of the Munsif of Goalundo, and then transferred to the Court of the District Judge of 24-Perganas, and thence to the receiver. On the 30th September, on objection being taken to this proceeding, the learned District Judge held that the execution made by the Goalundo Court being later than the appointment of the *interim* receiver could not prevail against the receiver.

Against this order the objectors appealed to the High Court.

Babu Brajendra Nath Chtterjee, for the appellants. I rely on s. 34, cl. (*1*) of the Provincial Insolvency Act. The money attached was assets realised in the course of execution before the adjudication order.

[MOOKERJEE J. Are there other creditors?]

Not in the same position as the appellants.

Regarding the words "assets realised" see s. 285 of the old Code of Civil Procedure. If realised before the adjudication order, it becomes immediately available for distribution among the creditors.

The money was attached after the appointment of the *ad interim* receiver but before the adjudication order was made by which the estate of the insolvent was vested in the receiver.

[MOOKERJEE J. See s. 16, cl. (*6*)].

This lays down the general rule, which is qualified by what is laid down in s. 34.

No one appeared for the respondent.

MOOKERJEE AND BEACHCROFT JJ. This appeal is directed against an order made in the course of a proceeding under the Provincial Insolvency Act. On the 1st August 1912, the respondent, Khitish Chandra Banerjee, applied to be adjudicated an insolvent. The order was made on the 30th September 1912. Meanwhile on the 2nd September 1912, the District Judge had appointed an *interim* reciever under section 13, clause (*2*). Notice was issued at the same time to the Examiner of the Eastern Bengal State Railway to pay into Court what was due from the Railway authorities to the insolvent. Before this intimation reached the railway authorities, the sum in their hands, which had been attached in execution of a decree obtained by the appellant against the applicant in insolvency, was paid into the Court of the Munsif of Goalundo. The money has subsequently been transferred by the Goalundo Court to the Court of the District Judge of the 24-Perganas, and is now in the hands of the receiver appointed after the adjudication order. The question in controversy is, whether the appellant, as a creditor who had attached this sum before the estate of the insolvent vested in the reciever appointed after the adjudication order, is entitled to apply it exclusively in satisfaction of his claim. The answer must depend upon the effect of the order for the appointment of an *interim* receiver.

Section 13, clause (*2*) of the Provincial Insolvency Act, provides that the Court at the time when the insolvency petition is admitted or at any subsequent time before adjudication, may, of its own motion or on the application of any creditor, make an order for the appointment of an *interim* receiver of the property of the debtor or any part thereof. The object of the

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appointment is clear from the proviso to the section in which it is stated that an order for the appointment of an *interim* receiver shall not be made unless the Court is satisfied that the debtor, with intent to defeat or delay his creditors or to avoid any process of the Court, has absconded or has departed from the local limits of the jurisdiction of the Court or has failed to disclose or has concealed, destroyed, transferred, or removed from such limits any documents likely to be of any use to his creditors. It is plain that an order for the appointment of an *interim* receiver of the property of the debtor is made for the protection of the estate of the debtor for the benefit of the entire body of creditors. At the stage when the *ad interim* receiver is appointed, no question arises as to the distribution of the property of the debtor amongst the creditors or as to preference amongst them. This view is not opposed to the decision in *Ex parte Fox* (1). It was there held, with reference to the terms of section 40 of the Bankruptcy Act, 1883, (46 & 47 Vict. c. 52) that the period of four months before the receiving order, for which the wages or salary of any clerk or servant in respect of services rendered to the bankrupt is entitled to priority over all other debts, include not merely the four months before the date of the receiving order but also the four months before the date of the order of appointment of an *interim* receiver where such appointment has been made. It is plain from an examination of the judgment of Cave J. that such construction was adopted with a view to afford protection to clerks and servants of the insolvent whom it was obviously the intention of the Bankruptcy Act to save. In our opinion, the money under attachment in execution of the decree obtained by the appellant against the applicant in

(1) (1886) 17 Q. B. D. 4.

insolvency is still available for the satisfaction of his claim. We may add that the appellant is also entitled to the benefit of clause (*1*) of section 34 of the Provincial Insolvency Act which restricts the operation of section 16 clause (*6*) and is in the following terms: Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of execution by sale or otherwise before the date of the order of adjudication. In the present case, the sum in question had been realised before the date of the order of adjudication. It had in fact been transferred by the railway authorities to the Goalundo Court where the execution proceedings initiated by the appellant were pending at the time. From this point of view, the appellant is exclusively entitled to the benefit of this money.

The result is that this appeal is allowed, and the order of the District Judge made on the 30th September 1912 set aside in so far as it affects the appellant. The appellant will be entitled to take this money in satisfaction of his decree. The money will be returned to the Goalundo Court in order that it may be paid out to the appellant and satisfaction entered on his decree.

G. S. *Appeal allowed.*

APPELLATE CIVIL.

1914

May 27.

Before Holmwood and Chapman JJ.

BISWAMBHAR SHAHA

v

RAM SUNDAR KAIBARTA*

Limitation—Mortgage suit—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 3 and 6—Limitation Act (IX of 1908) Sch. I, Art. 181—Transfer of Property Act (IV of 1882) s. 90—Personal covenant.

The plaintiff in a mortgage suit, who has his personal remedy at the date of the institution of the suit, would not lose his personal right by reason of his not having made the application for personal decree under O XXXIV, r. 6 within three years of the date of the confirmation of the mortgage-sale, since applications under O. XXXIV, r. 6, are not governed by Art. 181 of the Limitation Act any more than an application for order absolute under O. XXXIV, r. 3.

Rahmat Karim v. *Abdul Karim* (1) and *Madhabmoni Dasi* v. *Pamela Lambert* (2) referred to.

SECOND APPEAL by Biswambar Shaha and others, the defendants.

This appeal arose out of a decision of the Subordinate Judge of Comilla reversing the order of the Munsif of Comilla. The facts are shortly these. The decree-holder filed a petition under section 90 of the Transfer of Property Act for permission to proceed against the properties of the mortgagor other

* Appeal from appellate Decree, No. 1016 of 1912, against the decree of Satkowri Haldar, Subordinate Judge of Comilla, dated Nov. 13, 1911, reversing the decree of Phanindra Mohan Chatterjee, Munsif of Comilla, dated May 20, 1911.

(1) (1907) I. L. R. 34 Calc. 672. (2) (1910) 12 C. L. J. 328.

than the mortga gd properties for realisation of balance of the mortgage decree. The original mortgagor died before the institution of the suit. His heirs opposed the petition by submitting that the petition, having been presented more than three years after the last execution, was barred by limitation. The learned Munsif, holding that Article 181 of the Limitation Act applied, rejected the petition.

Against this order the decree-holder appealed to the Subordinate Judge of Comilla who set aside the order of the lower Court and remanded the suit to the Munsif for determination of the balance legally recoverable from the defendants otherwise than from the property sold.

Against this order of the Subordinate Judge the defendants appealed to this Court.

Babu Sasadhar Roy, for the respondent, submitted that this appeal should not be heard since the order of remand, against which this appeal was preferred, was carried out by the first Court without the judgment-debtors making any attempt to stay proceedings or to expedite the hearing of the appeal in this Court. There has been great laches.

Babu D. L. Kastgir, for the appellant, submitted that the application of the decree-holder was barred by limitation. The fact that the remand order was carried out does not matter in the least. The new Art. 181 of the Limitation Act applies to a case such as this. The Legislature intended to remedy the earlier law.

The present application was under the Civil Procedure Code, Order XXXIV, rule 6, and the right to apply accrued from the date when the proceeds of the sale of the mortgaged property were found insufficient. The decisions in *Purna Chandra Mandal*

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v. *Radha Nath Dass* (1) and *Rahmat Karim* v. *Abdul Karim* (2) were no more good law since they were decisions under the law of Limitation before the amendment of 1908.

Babu Sasadhar Roy, in reply. The present law of Limitation does not profess to provide for all applications. Reads the Preamble where the words used are "law relating to the limitation of the suits, appeals and *certain* applications." Under O. XXXIV rule 6 no application is contemplated. It merely declares the power of the Court to pass a supplementary decree for money against the mortgagor personally. No application is necessary in such a case. The mortgagee simply reminds the Court to do what it could do of its own motion. The decisions referred to by my learned friend were still good law and have been followed in *Madhabmoni Dasi* v. *Pamela Lambert*(3). True, that case dealt with an order absolute but in principle there is no real distinction. I further rely on *Tiluck Sing* v. *Parsotein Proshad*(4) which has never been dissented from.

Babu D. L. Kastgir, in reply. The case of *Madhabmoni Dasi* v. *Pamela Lambert* (3) decided that certain applications, though made after the amendment of the Code, were merely a continuation of applications made before the amendment. Moreover, that case has nothing to do with an application for a supplementary decree and is therefore distinguishable.

HOLMWOOD AND CHAPMAN JJ. This is a second appeal arising out of a decision given by the Subordinate Judge of Comilla on the 13th November

(1) (1906) I. L. R. 33 Calc. 867.
(2) (1907) I. L. R. 34 Calc. 672.
(3) (1910) 12 C. L. J. 328.
(4) (1895) I. L. R. 22 Calc. 924

1911, holding that a certain application under section 90 of the Transfer of Property Act was not barred by limitation and that the suit must be remanded to the Munsif for determination of what balance is legally recoverable from the defendant otherwise than from the property sold. An appeal was preferred to this Court on the 15th July 1912, and the first ground was with regard to the question of limitation, the second ground was with regard to the order of remand, the third was the general ground that the learned Subordinate Judge has misconstrued the law. That can only refer to the law of limitation which was the only question raised.

As regards the remand, we find that the defendants-appellants have been guilty of the greatest laches. The appeal which they filed on the 4th May 1912 was without the certified copy of the Munsif's judgment and could not be admitted till the 15th July. The *talabana* was not filed till the 10th January 1913, and meanwhile the learned Munsif had heard the remand and decided it in November 1912. We have seldom met with a case where the appellant deserved less consideration from the Court. But as regards the question of limitation, it is of course quite open to him still to argue that.

This is the only point which we can consider. It raises a somewhat new point. The mortgage decree was passed on the 1st April 1905, the mortgage was dated the 2nd March 1901, the due date was 12th February 1902, and the plaint in the mortgage suit was filed on the 11th February 1905. On the authority of the ruling in *Rahmat Karim* v. *Abdul Karim*(1), the plaintiff had his personal remedy at the date of the institution of the suit. The question which has been raised in this case is whether he loses that personal

(1) (1907) I. L. R. 34 Calc. 672.

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right by reason of his not having made the application for personal decree under Order XXXIV, rule 6 within three years of the date of the confirmation of the mortgage sale which took place on the 12th September 1907. The application which he did make was on the 31st January 1911. On that date the new Code of Civil Procedure was in force, and it is argued that Article 181 must necessarily apply to an application of this nature. It was held that the section which corresponded to section 181 in the later Limitation Act, namely Article 178 did not apply to an application by a mortgagee for a supplemental decree under section 90 of the Transfer of Property Act, and since the new Civil Procedure Code has come into force there has been the ruling in the case of *Madhabmoni Dasi* v. *Pamela Lambert*(1), where Mr. Justice Mookerjee in delivering the judgment of the Court follows the decision, to which one of us was a party, in *Rahmat Karim* v. *Abdul Karim* (2), and applies it to Order XXXIV, rule 3, which is the case of order absolute in a mortgage suit.

It is urged that what applies to Order XXXIV rule 3 does not apply to Order XXXIV, rule 6. But we are unable to accede to this contention. Not only are both the cases in our opinion strictly parallel but the rule of law and justice which was the *ratio decidendi* of the case in *Rahmat Karim* v. *Abdul Karim* (2) applies as has been shown by Mr. Justice Mookerjee to both the cases equally. The passage to which we were referred in his judgment may be quoted. "It may be conceded that Article 178 of the Limitation Act of 1877 did not apply to applications beyond the scope of the Civil Procedure Code; but it does not follow that that article or the corresponding article

(1) (1910) 12 C. L. J. 328. (2) (1907) I. L. R. 34 Calc. 672.

of the Limitation Act of 1908 applies to all applications made in the course of the suit. It may be pointed out in the first place that the preamble to the Limitation Act of 1908 states expressly that the object of the Legislature was to consolidate the law of limitation relating to only certain applications to Court; in other words, the Limitation Act does not profess to provide for all kinds of applications to Courts whatsoever. The Act certainly does not apply to applications to the Court to do what the Court has no discretion to refuse"; (and this is one of those matters in which the Court has no discretion to use if it is legally recoverable). The words "legally recoverable" cannot possibly apply to any question of limitation; "nor can the provisions of the Act be held to apply to an application to the Court to terminate a pending proceeding the final order in which has been postponed for the benefit of the defendant or for the convenience of the Court. In cases of this class it has been suggested that the right to make an application may indeed be deemed to accrue from moment to moment. If this view is adopted any exception on the ground of limitation cannot obviously be supported"; and in this connection the learned Judge cites the case in *Rahmat Karim* v. *Abdul Karim* (1), to which we have already referred, and applies it in support of the principle which he here lays down. It is therefore clear that applications under Order XXXIV, rule 6, are not governed by Article 181 of the Limitation Act of 1908 any more than applications for order absolute under Order XXXIV, rule 3.

We are, therefore, of opinion that the learned Judge was right in holding that the suit was not barred by limitation and he was right in making the remand, and we dismiss the appeal and direct that all

(1) (1907) I. L. R. 34 Calc. 672

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costs including the costs in remand be paid by the appellant to the respondent.

We mark our sense of the defendants' dilatory conduct by doubling the ordinary hearing fee and making it two gold mohurs.

S. K. B. *Appeal dismissed.*

APPELLATE CRIMINAL.

Before Holmwood and Chapman JJ.

1914

June 4.

DEPUTY LEGAL REMEMBRANCER

v.

SITAL CHANDRA PAL.*

Provident Insurance—Company with share capital carrying on business of a provident insurance society—Liability to registration as such before receiving premiums—Provident Insurance Societies Act (V of 1912) ss. 2 (8), 6, 7, 21.

A company having a share capital divided into shares must, if it intends to carry on the business of a provident insurance society, be registered under the Provident Insurance Societies Act (V of 1912) before it receives any premium or contribution.

Oriental Government Security Life Assurance Co. v. *Oriental Assurance Co.* (1) explained.

IN January 1913, a company entitled the "*New King Insurance Co., Ld.*", with a share capital divided into shares, was started in Calcutta for the purpose of carrying on the business of a provident insurance society, and began to receive premiums without registration under the provisions of the Provident Insurance Societies Act (V of 1912). Two of the directors,

* Government Appeal No. 2 of 1914, against the order of D. Swinhoe, Chief Presidency Magistrate of Calcutta, dated Sept. 20, 1913.

(1) (1913) I. L. R. 40 Calc. 570, 578.

Sital Chandra Pal and Surendra Nath Chowdhry, were thereupon prosecuted before the Chief Presidency Magistrate, under ss. 6 and 21 of the Act, for having failed to apply for registration; and the same persons, with two others, the secretary and the agent of the company, were further charged, under ss. 7 and 21, with having received premiums without registration.

On the 20th September 1913 the Chief Presidency Magistrate acquitted the accused by an order in the following terms:—

> The prosecution admits that the defendant company is a company which has a share capital divided into shares. According to the finding in the *Oriental Government Security Life Assurance Co., Ld.* v. *Oriental Assurance Co., Ld.* (1), the provisions of the Provident Insurance Societies Act of 1912 do not apply to such a Company. Accused who are charged under that Act are, therefore, acquitted."

The Government of Bengal, thereupon, appealed against the above order of acquittal.

Mr. B. C. Mitter, for the Crown. The Magistrate's order is based on a misunderstanding of the decision in the case he cites. It was not held there that a company with a share capital does not require registration under the Provident Insurance Societies Act, 1912, if it carries on business as such. Refers to s. 2(*8*) of the Act.

Mr. N. C. Sen and *Babu Hem Chandra Sen*, for the respondents, prayed for a nominal sentence only.

HOLMWOOD AND CHAPMAN JJ. This is an appeal preferred by the Government against an order passed by the Chief Presidency Magistrate, Calcutta, on the 20th September 1913, acquitting the respondents Sital Chandra Pal, Surendra Nath Chowdhry, B. P. Ghose and Purna Chandra Ghose of an offence punishable under section 21 of the Provident Insurance Societies

(1) (1913) I. L. R. 40 Calc. 570, 578.

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Act (V of 1912). That section provides that any provident insurance society which makes default in complying with any of the requirements of this Act, and every director, manager or secretary or other officer or agent of the society who is knowingly a party to the default, shall be punished with fine which may extend to five hundred rupees, etc.

The learned Presidency Magistrate on an apparent misreading of the judgment of Mr. Justice Fletcher in the case of *Oriental Government Security Life Assurance Co., Ld.* v. *Oriental Assurance Co. Ld.* (1) thought that the company in question called the "New King Insurance Company, Limited" was not amenable to Act V of 1912, inasmuch as it was a company which had share capital divided into shares. But this is obviously untenable upon the construction of the plain wording of the Act in section 2, sub-clause (*8*) where it is stated that a provident insurance society means any person or body of persons, whether corporate or unincorporate, which receives premiums or contributions for insuring money etc. That clearly lays down that whether the society already in existence is a corporate company before, or whether its share capital is divided into shares or not, registration under the Provident Insurance Societies Act is necessary before business can be carried on under the conditions laid down in that Act. There is nothing in Mr. Justice Fletcher's judgment to the contrary. It appears that the legal advisers of the company were misled, *first*, by a remark which Fletcher J. made in the course of the argument; and, *secondly*, by a passage in his judgment at page 578. The remark was that the defendant company cannot be a provident insurance society as a provident society is not incorporated

(1) (1913) I L. R. 40 Calc. 570.

under the Companies Act but registered or inscribed under the Provident Insurance Societies Act. That is against the view taken by the Chief Presidency Magistrate, for what Fletcher J. says is that a company incorporated under the Companies Act cannot be a provident insurance society by reason of its registration under the Companies Act, not that any society may not be both a company and a provident insurance society; and again in the passage in his judgment at page 578 what he says is that the company he was dealing with considered that, by issuing policies not exceeding 500 Rupees, they can bring themselves under the heading of a provident insurance company, and were entitled to carry on business untramelled by the provisions of the law. This is not so, because under the Provident Insurance Societies Act registration has to be made subject to certain conditions which are set out in the Act and which have to be approved of by the Registrar, and these provisions do not apply to a company which has a share capital divided into shares. In saying this he does not say that a company which wishes to carry on the business of a provident insurance company need not be registered under the Act, but he says that the conditions which are set out in the Act obviously do not apply to a company which has already complied with these conditions in its published prospectus under another Act, and what he is referring to is the form of the policy and he holds that, so far from having complied with the law, they have simply tried to avoid the provisions of another Act, namely, the Indian Life Insurance Act of 1912, which were intended to prevent a company from embarking in the business of life insurance unless and until they had the amount of cash that was necessary for them to deposit with the Governor-

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General in Council in order to meet their obligations. So in this case the Act V of 1912 which is before us was intended to prevent the company from embarking in the business of life insurance unless and until it had been registered under the Act. There seems to have been a misunderstanding, and the learned Standing Counsel, who appears for the Government, does not press for anything more than a nominal penalty. But a mistake of law cannot take the defendants out of the word 'knowingly' in the section.

The order of acquittal must, therefore, be set aside, and in lieu thereof the respondents Nos. 1 to 3 will each be fined five Rupees. The respondent No. 4, Purna Chandra Ghose, against whom proceedings do not seem to have been pressed in the Court below, will be exempted from this order.

We understand that the society has already applied for registration but that the Government has not yet made rules necessary to carry out the purposes of the Act, and, in the circumstances, we are of opinion that this conviction should make no difference whatever to the result of any such application.

E. H. M. *Appeal allowed.*

APPELLATE CIVIL.

Before Stephen and Mullick JJ.

RAM SARAN LALL

v.

RAM NARAYAN SINGH.*

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June 16.

Jaigir—Sanad, construction of—Tenure created by document—Custom—Life estate—Use of the words 'putra poutradi'—Absolute and heritable estate—Regulation XXXVII of 1793 s. 15.

A grant of a *jaigir* is a grant for life only, but in the absence of any custom to the contrary, the addition of the words "*putra poutradi*" in the grant implies an absolute and heritable estate and passes an estate of inheritance.

Under a *sanad patta* the ancestor of the plaintiff granted a *jaigir* in the district of Hazaribagh to the grantee and his *putra poutradi*. On the death of the grantee and of his sons without any male issue, the plaintiff, finding that the tenants of the *jaigir* stopped paying him the rents, brought a suit for resumption of the *jaigir* on the ground that according to custom the grant was a service-grant and resumable by the grantor and his representatives on failure of male issue in the line of the grantee, and obtained a decree. On appeal to the High Court :—

Held, that the original grantee took an absolute, heritable, and alienable estate and that all his heirs were capable of inheriting it.

Ramlal Mookerjee v. *The Secretary of State for India* (1) followed.

Gulabdas Jugjivandas v. *The Collector of Surat* (2), *Bhujanga Rau* v. *Ramayamma* (3), and *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (4) referred to.

Perkash Lal v. *Rameshwar Nath Singh* (5) and *Roopnath Konwur* v. *Juggunnath Sahee Deo* (6) distinguished.

* Appeal from Original Decree, No. 464 of 1910, against the decree of S. C. Pal, Subordinate Judge of Hazaribagh, Aug. 12, 1910.

(1) (1881) I. L. R. 7 Calc. 304 ; L. R. 8 I. A. 46.
(2) (1878) I. L R. 3 Bom. 186 ; L. R. 6 I. A. 54.
(3) 1884) I. L. R. 7 Mad. 387.
(4) (1897) I. L. R. 24 Calc. 834 ; L. R. 24 I. A. 76.
(5) (1904) I. L. R. 31 Calc. 561.
(6) (1836) 6 S. D. A l. Rep. 158:

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APPEAL by Ram Saran Lall and others, the defendants.

Under a *sanad patta* Maharaja Sambhu Nath Singh Bahadur of Ramgarh, the ancestor of the plaintiff, Maharajah Ram Narain Singh, granted a *jaigir* of Mouza Salga, Pergana Karanpura, in the district of Hazaribagh in 1852, to one Kanai Singh and his *putra poutradi*. Kanai Singh had two sons, Sewbux who predeceased him without any issue, and Bansi Lal who died subsequent to him in 1897, leaving no male issue. After the death of the latter, the plaintiff took *khas* possession of the said Mouza, and some of the rents for the years 1897 and 1898 were collected by his *tehsildars*. Thereafter, the Manager of the encumbered estate of Bansi Lal, deceased, brought a suit in the Collectorate for arrears of rent against some of the *raiyats* and made the plaintiff a third party defendant. The suit was tried in a summary manner without determining the title of the plaintiff and was decreed in favour of the said Manager on the ground of previous possession. From that date the plaintiff was dispossessed from the Mouza and the other *raiyats* of the Mouza stopped paying rents to the plaintiff. On the 4th February, 1909, the plaintiff brought this suit for resumption of the *jaigir* of Mouza Salga and for mesne profits against the defendants who were the male descendants of the brother of Kanai, and alleged that the *jaigirs* of Ramgarh Raj according to custom were granted in lieu of services to be rendered and were resumable on failure of male issue in the line of the original grantee. The defendants in their written statement denied that the grant was a service grant and that it was resumable on failure of male issue in the direct line of the grantee, and alleged that the grant was made to their great grandfather, one Raghu Singh, who was the father of Kanai, and not

to Kanai, and that the plaintiff's right of resumption on the ground of failure of male issue was premature. The Subordinate Judge decreed the suit. The defendants, thereupon, appealed to the High Court.

Babu Umakali Mukerjee (with him *Babu Manmatha Nath Mukerjee* and *Babu Satindra Nath Mookerjee*), for the appellants. The words '*putra poutradi*' for the purposes of the present case must be taken to mean 'from generation to generation,' and not descendible only in the male line of descent. The case of *Ramlal Mookerjee* v. *The Secretary of State for India* (1) has laid down the construction to be put on those words. An estate tail-male was opposed to Hindu law. This was decided in *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (2). The words "*putra poutradi*" were words of purchase and not words of limitation and were recognised as such in the cases of *Bhujanga Rau* v. *Ramayamma* (3) and *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (4). The case of *Perkash Lal* v. *Rameshwar Nath Singh* (5) was not applicable. Unless the meaning of those words was limited by the word "*jaigir*", they must be held to convey an estate of inheritance.

Jaigir was not necessarily a life tenure: see Regulation XXXVII of 1793, section 15, and *Gulabdas Jugjivandas* v. *The Collector of Surat* (6). Its meaning must be regulated by the words of the *sanad* and the meaning assigned to it by the Subordinate Judge was wrong. None of the other disputed *sanads* contained the words "*putra poutradi*" and, therefore, these *sanads* must be disregarded. The case of

(1) (1881) I. L. R. 7 Calc. 304; L. R. 8 I. A. 46.
(2) (1872) 9 B. L. R. 377.
(3) (1884) I L. R. 7 Mad. 387.
(4) (1897) I. L. R. 24 Calc. 834; L. R. 24 I. A. 76.
(5) (1904) I. L. R. 31 Calc. 561.
(6) (1878) I. L. R. 3 Bom. 186; L. R. 6 I. A. 54.

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Bhagwat Buksh Roy v. *Sheo Pershad Sahu* (1) was relied on. There was no document which proved that the words in controversy meant lineal male descendants and confined the grant to the issue in tail-male. Those words, therefore, in the *sanad* meant 'from generation to generation' and conveyed an estate of inheritance. That was the meaning to be given to them, both in Chota Nagpur and in Bengal.

There was no evidence in this case to prove the existence of custom. When the deed itself purported to give an estate of inheritance to the grantee, unless the respondent was able to give evidence of custom that the words in controversy meant tail-male, he could not succeed. The custom must be alleged and proved by the party who alleged it.

Babu Provash Chandra Mitter (with him *Babu Susil Madhub Mullick*), for the respondent. The cases of *Roopnath Konwar* v. *Juggunnath Sahee Deo* (2) and *Perkash Lal* v. *Rameshwar Nath Singh* (3) were relied on as authorities for the alleged custom. The words '*putra poutradi*' in Bengal, just as the words '*naslan baad naslan*' in the United Provinces, meant an absolute and heritable estate. But it was different in Chota Nagpur. The only two cases in favour of the appellants, namely, the cases of *Ramlal Mookerjee* v. *The Secretary of State for India* (4) and *Bhujanga Rau* v. *Ramayamma* (5) did not refer to Chota Nagpur and were of no use to them. The other cases referred to by the appellants were not cases on customary tenure, a *jaigir* being essentially a customary tenure. Etymologically the meaning of the words '*putra poutradi*' was in the respondent's favour. Their

(1) (1913) 18 C. L. J. 277.
(2) (1836) 6 S. D. A. Sel. Rep. 158.
(3) (1904) I. L. R. 31 Calc. 561.
(4) (1881) I. L. R. 7 Calc. 304; L. R. 8 I. A. 46.
(5) (1884) I. L. R. 7 Mad. 387.

meaning was, subsequently, extended to estate of inheritance. At the time of the *sanad* in 1852 there was no fixed meaning to the word "*jaigir*", which was then in its transition stage, for it was not clear whether it meant a tenure descendible in the male line or a life estate. Originally it meant a life estate: see Regulation XXXVII of 1793 section 15 and the cases of *Gulabdas Jugjivandas* v. *The Collector of Surat* (1) and *Shrimant Raje Bahadur Raghojirao Saheb* v. *Shrimant Raje Lakshmanrao Saheb* (2), and gradually it came to mean a tenure descendible in the male line. To remove the ambiguity, the words '*putra poutradi*' were used in the deed. In 1877, *jaigir* came to mean an estate descendible in the male line and resumable by the grantor after failure of male issue. Therefore, in construing the *sanad* that meaning must be put to the document, which was intended to have been conveyed by it at the time of the execution.

Babu Manmatha Nath Mukerjee, in reply. If there was any intention to use the cases *Roopnath Konwur* v. *Juggunnath Sahee Deo* (3) and *Perkash Lal* v. *Rameshwar Nath Singh* (4) as evidence of custom, they ought to have been cited and used as evidence in the Court of the Subordinate Judge, so as to have enabled the appellants to rebut them. The custom on which the present suit has been based, has not been proved.

Cur. adv. vult.

STEPHEN AND MULLICK JJ. The plaintiff in this case is the zemindar of Perganas Raj Ramgarh which includes Mauza Salga, of which he says that a *jaigir*

(1) (1878) I. L. R. 3 Bom. 186; L. R. 6 I. A. 54.
(2) (1912) 16 C. W. N. 1058.
(3) (1836) 6 S. D. A. Sel. Rep. 158.
(4) (1904) I. L. R 31 Calc. 561.

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was granted to one Kanai Singh in 1852. Kanai had two sons, of whom one predeceased him, dying childless, and the other Bansi Lal succeeded him, but died in 1897 without leaving male issue. The plaintiff succeeded in collecting rents for two years, but was dispossessed by the defendants in 1899. He now sues for possession and mesne profits, alleging that he is entitled to resume his ancestor's grant on the failure of male issue of the grantee.

To this claim the defendants set up two defences, one based on fact and one on law. The first was that the grant was made not to Kanai, as the plaintiff says, but to Raghu, Kanai's father, of whom the defendants are descendants in the male line. There are many difficulties about this defence which is not supported by the evidence, and it was given up in the lower Court, and not raised here, and need not, therefore, be further noticed. The second defence raises a question of some importance. The facts are that the subject matter of the original grant was certainly a *jaigir*, and it was conveyed to Bansi with the words, or word, "*putra poutradi*" the significance of which we have to determine. Also there is evidence which may be summarised by saying that it shows that *jaigirs* granted by the Raj were terminable on the death of male heirs, though there is no case to show that this was so where the words "*putra poutradi*" were used.

There is good authority for saying that a grant of a *jaigir* is a grant for life only: *see* Reg. XXXVII of 1793, section 15, and *Gulabdas Jugjivandas* v. *The Collector of Surat* (1). The question is how is this estate extended by the addition of "*putra poutradi*." The words literally translated are, as we understand *putra*–son, *poutra*–grandson, and *adi*–others, but the expression must of course be construed in the first

(1) (1878) I. L. R. 3 Bom. 186; L. R. 6 I. A. 54.

place according to any construction that has been legally recognised. Such a construction is to be found in the following cases. In *Ramlal Mookerjee* v. *The Secretary of State for India in Council* (1), the Privy Council recognised as correct a construction of "*putra poutradi kramè*" which regarded it as implying an absolute and heritable estate, and as passing an estate of inheritance. The principal question there argued was whether the words would apply to a female as well as a male descendant; but the question arose in an administration suit and the decision that the words in question passed an absolute estate of inheritance cannot be treated as *obiter*. The same view seems to have been taken in *Bhujanga Rau* v. *Ramayamma* (2). In *Lalit Mohan Singh Roy* v. *Chukkun Lal Roy* (3), the same words as before were treated by the Privy Council in the same way. On the other hand, in *Perkash Lal* v. *Rameshwar Nath Singh* (4) this Court laid down that in Chota Nagpur the general rule recognised by the Privy Council was modified by a custom that the words "*al aulad*" were to be interpreted as limiting a grant to the lineal male descendants of the grantee, and it is argued, and in our opinion cannot be denied, that no wider construction can be given to the words "*putra poutradi*." But this custom was in effect applied only to a village in the Pergana Kanda. It is stated to be applicable to Chota Nagpur, which may mean the Pergana so named, or the area now known as the Chota Nagpur Division. If the former, the custom does not apply in this case; if the latter, it seems that the decision was wider than was necessary on the facts of the case.

(1) (1881) I. L. R. 7 Calc. 304, 315; L. R. 8 I. A. 46, 62.
(2) (1884) I. L. R. 7 Mad. 387.
(3) (1897) I. L. R. 24 Calc. 834, 849.
(4) (1904) I. L. R. 31 Calc. 561, 569.

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In the case of *Roopnath Konwur* v. *Juggunnath Sahee Deo* (1), a *jaigir* was granted "*nussulun-bad-nussulun*" in lieu of services, and a custom that the zemindar should resume the grant on the death of the *jaigirdar* without lineal descendants was recognised. The limits of the custom are not however prescribed, and the custom there acted on is not that which is now set up.

The result is that we see nothing in the cases to modify the general rule laid down by the Privy Council, in its application to the present case.

Under these circumstances, we hold that the original grantee took an absolute heritable and alienable estate; and that all his heirs are capable of inheriting it.

The result is that the appeal is allowed, the judgment and decree of the lower Court is set aside and the suit is dismissed with costs here and in the lower Court.

O. M. *Appeal allowed.*

(1) (1836) 6 S. D. A. Sel. Rep. 158.

CRIMINAL REVISION.

Before Sharfuddin and Teunon JJ.

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Sept. 7.

MEREDITH

v.

SANJIBANI DASI.*

Bailiff—Writ or warrant authorizing him to give possession of immoveable property—Use by bailiff of reasonable degree of force to effect removal of person refusing to vacate—Practice of bailiffs taking strangers as assistants—Time of delivery of writ of possession for execution—Piecemeal trial of lengthy cases by Magistrates—Penal Code (Act XLV of 1860) s. 323—Presidency Small Cause Courts Act (XV of 1882) ss. 43, 48—Civil Procedure Code (Act V of 1908) O. XXI, rr. 35, 97 and First Schedule, App. E, Form No. 11—Practice.

A bailiff of the Presidency Small Cause Court in the execution of a writ issued under s. 43 of the Presidency Small Cause Courts Act, requiring or authorizing him "to give possession" of certain premises to the applicant, may use a reasonable degree of force in order to effect the removal of persons bound by the decree and refusing to vacate the same, notwithstanding the omission in the writ of words expressly authorizing their removal.

Quære: Whether the English Common Law or the Civil Procedure Code applies to the writ or warrant in question.

In a writ of possession under the former, words expressly authorizing forcible removal are not inserted, but an order "to give possession" authorizes such removal if need be: and, if the Code applies, the omission of such words is immaterial.

O. XXI, r. 97 of the Civil Procedure Code merely provides an additional or alternative remedy.

Where the bailiff proceeded to the premises, and on the occupant's wife refusing to vacate, pulled or dragged her out of the house, and the force

* Criminal Revision No. 1274 of 1914, against the order of D. Swinhoe, Chief Presidency Magistrate, Calcutta, dated May 20, 1914.

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used for the purpose caused her, when released, to fall on the ground whereby she received slight injuries :—

Held, that he was legally justified in the employment of such amount of force, and could not be convicted therefor under s. 323 of the Penal Code.

In such cases it is impossible to calculate or apply with the utmost nicety the degree of force necessary and yet not more than sufficient.

Observations as to the practice of bailiff's taking with them as assistants persons unconnected with the Court, and as to the time of delivery to them of writs for excution.

Piecemeal conduct of trials by Magistrates condemned.

ON the 31st January 1913, at 4 P.M., the petitioner a bailiff of the Calcutta Small Cause Court, received a writ or warrant, issued under s. 43 of the Presidency Small Cause Courts Act requiring and authorizing him "to give possession" of a portion of premises, No. 4, Jagannath Sur's Lane, then in the occupation of Purna Chandra Pal and his family, to his brother, Kali Charan Pal. The petitioner, accompanied by Kali Charan, a peon, and a friend named T. G. Bomswetch, said to be a detective, proceeded to the house in question where he arrived at about 4-30 or 4-45 P.M. The story of the prosecution was that they at first directed Purna Chandra, who was then in the *baithakkhana*, to vacate the premises, but that the latter asked for 24 hours' time to remove, and next for two hours to finish their meal, both of which requests were refused, and that the petitioner then called coolies who began to remove the articles from the house to the street. The petitioner and Bomswetch next entered the cookroom where Sanjibani, the wife of Purna, was preparing their meal, whereupon she left the room with her little girl and sat on the ledge outside. The two *sahibs* then ordered the peon to take the child outside the house which he did. Sanjibani went into the *baithakkhana* and the petitioner, entering therein, seized her, dragged her out into the street, threw her down and, it was

alleged, began to kick her. Purna then came out raised her and took her to the house of a neighbour. The petitioner and Bomswetch were said to have been drunk at the time.

It appeared that the petitioner met with some opposition in delivering possession, and sent several messengers to the Burtolla thana for police assistance which did not reach him in time. It was alleged by the prosecution that, at about 7 or 7-30 P.M., Purna wrote out a letter of complaint, which was signed by Sanjibani, and took it to the thana. At 11-45 P.M. she went personally to the thana and lodged an information which was entered in the Bengali "Register of Cases," in terms set out in the judgment of the High Court, and signed by Purna and Hem Chandra Lahiri, the Sub-Inspector. The earlier letter was not embodied in the said register, but in the column intended for the informant's name, the word "*chitti*" was found written above the signature of Purna. In the corresponding entry in the English register the word "*chitti*" did not appear, but instead were written the letters "*B.B.*" which were explained as signifying "Bengali book."

Next morning Sanjibani was examined by Fanindra Kumar Gupta, L.M.S., who was said to have given her a certificate, and later on she filed a complaint against the petitioner and Bomswetch before the Chief Presidency Magistrate to whom she showed the injuries on her person. On the same day the petitioner returned the writ with an endorsement "*Possession given to plaintiff personally at 6-5 p.m. after considerable difficulty.*" He also made a verbal report of the occurrence to Mr. Nuttal, Clerk of the Court, and showed a swelling on his head as the result of a blow he said he had received. He was directed to submit a written report and did so on the same

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date. The report was afterwards found to be missing. The Registrar of the Court, having considered it to be meagre in details, called for a further report which was submitted on the 3rd February 1913.

The petitioner and Bomswetch were jointly tried before Mr. Keays, the Second Magistrate. The trial commenced on the 12th March 1913, and concluded in an acquittal of both on the 3rd May, after 17 hearings, on each of which occasions one, two or at most three witnesses were examined or cross-examined either in whole or part. The High Court set aside the order of acquittal, and directed a retrial which came on before the Chief Presidency Magistrate on the 5th December 1913. The case was heard on 38 days, and did not, on several occasions, last more than 10 or 15 minutes at a time. The arguments were extended over portions of six days. Judgment was delivered on the 20th May 1914, and the petitioner was convicted under s. 323 of the Penal Code and sentenced to a fine of Rs. 50, and in default to a fortnight's simple imprisonment.

The judgment of the Magistrate dealt with the evidence in detail, and after finding that the petitioner was not drunk, and that the letter of complaint had been produced at the first trial and was genuine, continued as follows:—

"The defence further contends that the prosecution story as to the manner in which the complainant was ejected is untrue. There can be no doubt that the accused experienced very considerable difficulty in ejecting the females from the house, especially the complainant, and had to send three or four times to the thana to obtain Police assistance to enable him to do so. It is not at all likely that after this opposition the complainant, who is a pardanashin, would come quickly to the door with a crowd of strangers looking on, and go out of the house as stated by the defence, and I do not believe that she did so. On a careful consideration of the evidence and the arguments adduced by both sides I am of opinion that the accused had the complainant's child taken out of the house in the hope that she would follow it quietly. Finding that she still refused or was reluctant to go out, and his

attempt to obtain Police assistance was infructuous, and that it was getting late, he became exasperated and pulled or dragged complainant out of the house, and pushed or jerked her from him in such a manner as to cause her to fall and receive the injuries on her elbow and knee, and caused her bodily pain. I find the accused guilty of the offence charged. I do not believe he deliberataly kicked the complainant when she was down. I think it quite possible that he, on seeing her fall, went up to ascertain what had happened to her and pushed her more than once with his foot to make her rise, and this action of his was taken by the excited on-lookers as a deliberate kicking of the complainant and led to the accused being assaulted by one of them. I convict the accused under section 323 I. P. C. and sentence him to pay a fine of Rupees fifty, and in default a fortnight's simple imprisonment."

The petitioner then moved the High Court and obtained the present Rule.

The Advocate-General (*Mr. G. H. B. Kenrick*, K.C.) (with him *Mr. P. L. Roy* and *Mr. J. W. Chippendale*), for the petitioner. The Magistrate has not considered the main questions of law which govern this case, namely, whether the bailiff was legally justified in using sufficient force to overcome the opposition of, and eject, the complainant, and whether, assuming that the bailiff had legal justification for using force sufficient to overcome resistance to his execution of the order for possession, he used such degree of force only as was in the circumstances reasonably necessary and was, therefore, justified by law, and so committed no offence under section 323 of the Penal Code, or whether, on the other hand, he exceeded such degree of force so as himself to become an aggressor.

The Magistrate appears to have acted erroneously on the assumption that if any, the slightest, degree of force were used by the bailiff, he would be guilty of an offence.

The bailiff was acting in the course of his duty as a public officer in carrying out an "order for possession" duly entrusted to him for execution and

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properly made under sections 41 to 43 of Act XV of 1882. Refers also to ss. 43 and 44.

In this connection it is material to bear in mind section 79 of the Penal Code.

Now it is obvious that the bailiff cannot carry out his statutory duty of giving possession of the property to the applicant until he has first acquired possession of it himself.

Section 41 contemplates the use of actual compulsion or force, if necessary, in order to obtain possession of the property.

In this respect, the order for possession is directly analogous to the English Writ of Possession, which is a writ of execution in an action for the recovery of possession of land directed to the Sheriff and commanding him " that you enter the same, and without delay you cause the said A. B. to have possession of the said land and premises ".

As to this old Writ of Possession (or " *habere facias possessionem* " as it was formerly called), it has long been settled that its authority would justify the use of force.

In *Semayne's Case* (1) it was held that, " when any house is recovered by ejectment (the predecessor of an action for recovery of possession of land), the Sheriff may break the house (*i.e.*, the officer may, if necessary, break open either the outer or the inner doors of the house) and deliver the seisin or possession to the plaintiff, for the words of the writ are *habere facias seisinam or possessionem*, etc., and after judgment it is not the house in right and judgment of law of the tenant or defendant." In *Upton* v. *Wells* (2), it was held that the Sheriff or his officers in executing a writ of possession *must remove all persons* from off the premises, for if any persons are left thereon the

(1) (1604) 5 Coke 91. (2) (1559) 1 Leon. 145.

execution is not complete: Halsbury's Laws of England, vol. 14, p. 77, "The Sheriff must at once proceed to deliver to the plaintiff complete possession of the premises turning out by force, if need be, all other persons. See also Mather's Execution Law, 2nd Ed., p. 159.

From the wording of the order or warrant of possession: "this is to require and authorize you (*i.e.*, the bailiff) to give possession of the said piece of land to the said plaintiff," together with the provisions of sections 41-44 of Act XV of 1882, it is clear that the order of possession was intended to be a mode of execution in Presidency towns analogous to the Writ of Possession, and that the bailiff, to whom it is addressed and who is under the statutory obligation of obedience to it, has powers analogous to the Sheriff's officer in England. In other words he has power and authority to use such force as may be necessary to obtain possession and to eject all persons from the premises. If he had not such power, the process would be futile, and if persons on the premises might not lawfully be removed with force, when they refuse to go, there would be an *impasse* and the legislation would become meaningless.

This being manifestly the law which is applicable, it only remains to apply it to the facts of the case as ascertained by the actual findings of the Magistrate.

From these it appears (*a*) that the bailiff at first tried to get the complainant to leave quietly, but she refused. She was, therefore, guilty of offences under sections 183 and 186, Penal Code.

He was legally entitled - though the Magistrate does not recognize this—to use sufficient force to put and keep her outside the house.

(*b*) The Magistrate disbelieves and finds against the prosecution allegations of a wilful kicking. This

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seems very material on the question of whether the force used was necessary and reasonable or was excessive and so unjustifiable.

(*c*) The Magistrate forms the hypothesis that " he (the bailiff) became exasperated, and pulled or dragged the complainant out of the house, and pushed or jerked her from him in such a manner as to cause her to fall."

Neither the prosecution nor the defence alleged this version. The Magistrate does not find that the bailiff used excessive violence, *i.e.*, more force than, having regard to her resistance, was necessary to eject the woman and keep her outside.

Unless it can properly be held that the bailiff in the circumstances used an unnecessary degree of force, and as to this there is no finding by the Magistrate, he was improperly convicted of an offence.

Assuming, and this is not inconsistent with the actual findings, he used only such force as was necessary to effect the ejection, he would undoubtedly be protected by the Penal Code, sections 78 and 79.

The Magistrate appears to have overlooked or not recognized the fact that the bailiff was a public officer acting in the course of his duty under a judicial warrant or order requiring him to obtain and give possession. He had no option but was in law obliged to turn out any person from the premises, and to use any force which might be required to get and keep such person outside.

In all the circumstances the case was decided erroneously by the Magistrate without applying the correct legal principles. His findings of fact are insufficient to support the conviction.

Babu Manmatha Nath Mukerjee (with him *Babu Heramba Chandra Guha* and *Babu Satindra Nath Mukerjee*), for the opposite party. Section 48 of Act

XV of 1882 renders the provisions of the Civil Procedure Code applicable to the case of the present writ. O. XXI, r. 35 (*1*) of the Code provides that possession of immovable property shall be delivered, if necessary, "by removing any person bound by the decree who refuses to vacate." The form of the warrant in Appendix E, No. 11, states that the bailiff is "hereby authorized to remove" such person. No such authority was given to the petitioners in the present case, and he was, therefore, not justifed in using force. The proper course for him to have adopted, in the circumstances, is indicated in rule 97 of the same Order. In any case the findings of the Magistrate that he pushed or jerked the complainant so as to cause her to fall, and that he pushed her with his foot to make her rise, show the employment of unnecessary and improper violence, and constitute the offence under s. 323 of the Penal Code.

Cur. adv. vult.

SHARFUDDIN AND TEUNON JJ. In this case the accused petitioner, one H. Meredith, a bailiff of the Presidency Small Cause Court, has been convicted under section 323 of the Indian Penal Code, and sentenced to pay a fine of Rs. 50.

It appears that, at about 4 P.M., on the 31st of January 1913, he was entrusted with a writ or warrant (Exh. M.) which required and authorized him to give possession to the decree-holder, Kali Charan Pal, of certain premises then in the occupation of the judgment-debtor, Purna Chandra Pal. As the warrant was to be executed that very day, he forthwith proceeded on his errand, reached the premises (No. 4, Jagannath Sur's Lane) at or about 4-30 to 4-45, and, as he reported on the 31st, succeeded, "after considerable difficulty,"

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in giving vacant possession to the decree-holder at 5 minutes after 6.

At 11-45 P.M., a complaint was lodged against him and his companion, one Bomswetch, at the neighbouring thana. The complaint was made by the judgment-debtor Purna Chandra Pal, or by the judgment-debtor's wife, one Sanjibani Dasi, and was summarized in the thana 'Daily Register of cases' as follows: "Assault (*i. e.*, on Sanjibani); abrasion marks (*chila dag*) on both elbows, abrasion mark on right knee, and pain all over the body complained (or spoken) of; (she) does not want to go to hospital."

On the following day, the 1st of February, the woman Sanjibani presented a complaint before the Chief Presidency Magistrate. The complaint recites that, when required by the bailiffs (Bomswetch was then supposed to be a bailiff or assistant bailiff) to leave, the husband represented that having had no previous notice he was not prepared to move out immediately, and prayed for 24 hours' time. It then proceeds to say that being thereby enraged the two accused (i) threw out the household articles with the help of coolies, (ii) broke the kitchen utensils and destroyed the food then under preparation, (iii) had the complainant's child removed from her arms and carried out by a peon, (iv) that the accused Meredith next caught hold of her by the hand, forcibly dragged her out of the house, and pushed her, and (v) that, when (in consequence of the push) she fell, both accused kicked her.

The complaint next refers to a medical examination by a doctor, and a certificate furnished by him, and also to an information "sent after some time to the local thana." It may be here observed that to the charges made in the complaint the husband and other prosecution witnesses at the trial added the further

charge that at the time in question both accused were drunk.

The accused Meredith's defence is to be found in the report submitted to the Clerk of the Small Cause Court on the 3rd of February. It may conveniently be mentioned here that on the 1st of February, Meredith had reported verbally to the Clerk, Mr. Nuttal, and on his orders, had submitted a written report which cannot now be found. That such a report was, however, submitted is clear from the evidence of Nuttal and also from the evidence of Mr. J. G. Gupta, now an Additional Judge, and at that time Registrar of the Court. Mr. Gupta being of opinion that the report was lacking in detail required the submission of a further report, and this order resulted in the submission of the report of the 3rd February (Exh. N). That the report of the 1st February should be missing is much to be regretted, but for present purposes it is sufficient to say that it does not appear that the accused Meredith is in any way responsible for the loss.

In the report of the 3rd February, the bailiff states that the judgment-debtor did ask for time, that the decree-holder refused to listen, that while coolies were removing the household properties, a pleader, named K. D. Mitter, appeared, and said that 24-hours' notice should have been given, and directed the woman not to leave. The bailiff proceeds to say that he then sent four messengers one after the other to the local thana for assistance, proceeded with the removal of the properties, and had a *ghary* fetched for the women of the house. On the arrival of the *ghary* the complainant went to the door, whereupon the bailiff stepped behind her. He continues that, at the instance of the pleader already mentioned, first the woman and then the judgment-debtor, her husband, tried to push past him, and that when he turned to

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shut the door he was struck two blows on the head from behind. In the report no reference is made, it may be observed, to the incident of the child.

The case came on for trial before Mr. Keays, the Second Presidency Magistrate, who, on the 3rd of May 1913, delivered judgment acquitting the accused. For the purpose of completing this narrative it may be mentioned that his findings were (*i*) that the allegation that the accused were drunk had no foundation in fact; (*ii*) that the bailiff sent at least three messengers to the local thana for assistance; (*iii*) that the evidence regarding the alleged kicking could not be accepted; and (*iv*) that he, therefore, could not act on the evidence to the effect that the accused bailiff had given the complainant a push. In fact he appears to have been of the opinion that the defence was true, and that the trifling injuries sustained by the complainant were sustained in her efforts to push her way into the house which she had left.

Against Mr. Keay's order of acquittal, the complainant moved this Court which, on the 23rd of October, set aside the order of acquittal as against Meredith, and directed his retrial mainly on the ground that the trying Magistrate had not enquired into the authenticity of a certain letter of complaint (now marked Exh. 1) said to have been written by Purna, signed by Sanjibani and taken to the thana by Purna at 7 to 7-30 on the evening in question.

The case against Meredith accordingly came on for retrial before the Chief Presidency Magistrate, Mr. Swinhoe, who, on the 20th of May 1914, delivered judgment convicting the accused and sentencing him as we have already stated.

Mr. Swinhoe's findings are to the effect (*i*) that the prosecution story as to the letter Exhibit 1 is substantially true; (*ii*) that the accused bailiff was not drunk

or under the influence of liquor; (*iii*) that the bailiff experienced considerable difficulty in ejecting the women of the house, more particularly the complainant, and accordingly sent three or four messengers to the thana for assistance; (*iv*) that in the hope of inducing the mother to go quietly the bailiff first had the child taken out; (*v*) that this device failing, he became exasperated and pulled or dragged the woman out of the house; and, lastly, (*vi*) pushed or jerked her from him in such a manner as to cause her to fall and so receive the injuries found on her elbows and knee.

He further found that the accused did not deliberately kick the complainant, but having come to this distinct finding he went on to say: "I think it quite possible that on seeing her fall he went up to ascertain what had happened to her, and pushed her more than once with his foot to make her rise."

Against the conviction and sentence based on these findings, the accused moved this Court on the 24th July, and being dissatisfied with the manner in which the case had been tried, we issued the present Rule in order to our examination of the evidence and our consideration of the question whether the accused had in fact exceeded his lawful authority in the execution of the warrant entrusted to him.

We have now been taken over the whole of the evidence, and have had the advantage of hearing the learned Advocate-General for the petitioner, and Babu Manmatha Nath Mukerjee on behalf of the complainant, opposite party.

The warrant of possession, it is to be premised, was one issued under the provisions of sections 41 to 43 of the Presidency Small Cause Courts Act (XV of 1882), is in the English Common Law form, and "requires and authorizes" the bailiff "to give possession."

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The contentions of the learned Advocate-General then are: (*i*) that to the execution of this warrant in the Presidency town of Calcutta the provisions of the English Common Law are applicable; (*ii*) that on the refusal of the complainant to vacate, the accused bailiff was justified, and indeed, in order to the complete execution of the warrant, was required to remove the complainant from off the premises by the use of such force as might be found necessary; (*iii*) that in dragging or pulling the complainant out of the house and pushing or jerking her so as to cause her to fall, the bailiff did not in fact use excessive or unnecessary violence; (*iv*) that the passage in the judgment regarding the touch or push with the foot does not embody a finding; and lastly, (*v*) that the more serious allegations of the prosecution having been disbelieved, no findings adverse to the petitioner should have been arrived at.

On the other hand, on behalf of the complainant, opposite party, it is contended (*i*) that by reason of the provisions of section 48 of the Presidency Small Cause Courts Act, the provisions of the Code of Civil Procedure (that is, Order XXI, rule 35) are applicable to a writ or warrant such as that now in question; (*ii*) that by reason of the omission from the writ or warrant of the words "and you are hereby authorized to remove any person bound by the decree who may refuse to vacate the same," being the words used in warrants issued under Order XXI, rule 35 (*vide* form No. 11, First Schedule, Appendix E), the accused bailiff was not justified in using force, and on show of opposition or resistance should have proceeded in the manner indicated in Order XXI, rule 97; (*iii*) that, in any view of the case, in "pushing or jerking the complainant from him in such a manner as to cause her to fall," and thereafter "in pushing her with his foot to

make her rise" he used unnecessary and improper violence.

Whether the provisions of the English Common Law or of the Code of Civil Procedure are applicable to the writ or warrant now in question need not, we think, be decided in the present case. Under the provisions of either law, in the execution of a writ of possession, a reasonable degree of force may be used in order to the removal of persons bound by the decree and refusing to vacate. That the complainant, a dependent of the judgment-debtor and asserting no independent right to the premises, was bound by the decree is not questioned. In a writ of possession issued under the English Common Law words expressly authorizing forcible removal are not inserted, but it is settled law that the order to "give possession" authorizes and requires the removal of all persons from off the premises by force if need be. In the Small Cause Court it appears this form is followed, and even if the Civil Procedure Code be applicable, the omission of the words expressly authorizing removal is in our opinion immaterial. Order XXI, Rule 97, merely provides an additional or alternative remedy.

We are then unable to accede to the complainant's contention that the trying Magistrate has found as a fact that, after the complainant had fallen, the accused touched or pushed her with his foot. To say that a thing may possibly have happened is not to find that it did happen. The Magistrate was evidently not prepared to come to a definite finding that the accused touched the complainant with his foot, he should have said so without ambiguity, and should have omitted from the judgment what is mere conjecture.

We are then left with the finding that "on pulling or dragging the complainant out, the accused pushed or jerked her from him in such a manner as to cause

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her to fall and receive the injuries found on her knee and elbows."

The complainant having obstinately refused to leave, and the hour being late, it has not been contended before us that in pulling her out of the house by her hand, the bailiff, in the view of the law we have taken, did more than he was justified in doing. But it is contended, and no doubt properly contended, that the woman being once on the roadway, it was highly improper for the accused to proceed further to "push or jerk her" so as to cause her to fall. It is, however, not disputed that between the dragging and the so-called jerk there was no interval, and that the whole represented one continuous act. In effect, then, it comes to this that, when the accused let go his hold, the force used for the purpose of pulling out the resisting complainant was sufficient to cause her to fall. In cases such as this it is impossible to calculate and apply with the utmost nicety the degree of force necessary and yet not more than sufficient. Even, therefore, on the Magistrate's own findings we think that the accused should not have been convicted.

But we should further say that we are not satisfied that the Magistrate's findings are correct. We need not discuss the evidence at great length, but we may observe that the Magistrate has accepted the prosecution story with regard to Exhibit 1, the letter of complaint said to have been taken to the thana at 7 or 7-30. That letter is of importance mainly from the point of view of the charges of drunkenness and kicking, but the Magistrate's estimate of the value of this letter has doubtless largely coloured his view of the rest of the evidence.

We are of opinion that he should not have relied upon this letter. It is not referred to in the complaint

of the 1st February. It was not put to the prosecution witnesses in their examination-in-chief. It was mentioned for the first time on the 4th of April in a volunteered statement made by Purna during his cross-examination at the 8th hearing before Mr. Keays, and was not produced before the 10th hearing on the 10th of April.

In the thana Case Register there is no independent entry of the letter and of its receipt at 7 or 7-30. No doubt in the "thana Bengali Case Register" against the entry of Sanjibani's complaint at 11-45, in the column intended for the signature of complainant, above the signature of Purna Chandra Pal, appears the word *chitti* (letter), but in the English Register submitted to the Deputy Commissioner at midnight, the entry in the corresponding column is merely a reference to the Bengali Register implying that the signature would there be found. There is no reference to any letter, though, according to the correct practice, no doubt not invariably followed, the word *chitti* or letter should have been reproduced in the English Register. Moreover, the signature of Sanjibani on the letter is much more regular and more formed than that on the complaint, though in the agitation following upon the occurrences of the evening, the reverse was to be expected. No doubt the thana Sub-Inspector has supported the prosecution in respect of the letter, but it is to be observed that by reason of a stormy interview between him and Meredith, who went to the thana at about 6-30 to complain of the Sub-Inspector's failure to send assistance, the Sub-Inspector has obviously reasons for irritation against the accused, and it is on his evidence and on a belated entry relating to Meredith's visit that the discredited charge of drunkenness largely rests.

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There has also been some controversy as to the medical certificate spoken to by the medical practitioner, Fanindra Kumar Gupta (L. M. S.). Such certificates when filed with complaints in the Chief Presidency Magistrate's Court, it appears, are stamped, and then returned for production at the trial. In the present case the certificate (Exh. 3) was not produced at the trial before Mr. Keays until the 29th of March, and it is suggested that it is not the certificate first granted and referred to in the complaint. As, however, it is not disputed that there were scratches on the complainant's elbows and on the knee, the certificate is of importance only in so far as the reference therein to "contusions on the back and loins" (reduced in the doctor's deposition to an "oval contusion an inch in size below the right shoulder") supports the discredited charge of kicking, we need not enter into this question. We may, however, take the opportunity of deprecating the return of such documents when once filed.

We may next observe that the trying Magistrate has apparently overlooked the fact that a sanction for the prosecution of the witness Krishna Dhan Mitter had been granted by the Chief Judge of the Small Cause Court, and that this witness and the other witnesses concerned in him cannot, therefore, be regarded as wholly disinterested.

Lastly, we have to say that the witnesses having been disbelieved with regard to the graver charges brought against the accused, for instance, the charges that he was drunk in the execution of his duty, and that having thrown the woman down, he deliberately stamped upon and kicked her, we are of opinion that they cannot be safely believed with regard to the small residuum of what the Magistrate has conceived to be truth.

For these reasons, we make this Rule absolute, acquit the petitioner and direct that the fine, if paid, be refunded.

We might end our judgment here, but we are of opinion that in the public interest it is our duty to comment on the facts brought to our notice in this case, in connection with the procedure followed both in the Small Cause Court and in the Courts of the Presidency Magistrate.

The arrangements which in the Small Cause Court permit of the disappearance of papers, and do not permit of their being traced to some officer or person who can be held responsible must, in our opinion, be defective.

We have next to observe that in taking with him as an assistant one Bomswetch who, it appears, is not a bailiff or assistant bailiff or other Court or Government officer, Meredith's conduct, if not permitted by the rules of the Court, was reprehensible. If permitted by the rules of the Court, the practice, if it be a practice, should, we think, be strictly forbidden.

Lastly, the evidence shows that in this case the Writ of Possession, to be executed on the 31st January, was not handed over to the bailiff until at or about 4 P.M. of that day. The bailiff, it appears, protested, but the Clerk of the Court insisted upon immediate execution. It would seem to be obvious that a writ of this nature, involving in many cases, as in this case, the ejectment without notice of persons in peaceful possession of their houses should be put into execution at a much earlier hour. To do otherwise is unfair to the bailiff, must necessarily cause much gratuitous hardship, and so bring the Court into disrepute.

Turning now to the Courts of the Presidency Magistrates, we have to say that we view with grave

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concern the procedure that has been followed in this case. In the Court of the Second Presidency Magistrate the trial began on the 12th of March 1913, and did not close till the 3rd of May. In the course of the 1 month and 22 days there were so many as 17 hearings for the examination of witnesses, on each occasion one, two, or at most three witnesses being examined or cross-examined either in whole or in part.

In the Court of the Chief Presidency Magistrate the re-trial opened on the 5th December 1913, and judgment was not delivered until the 20th of May 1914. The trial then extended over a period of 5½ months, and in the course of the 5½ months, the case was put down for hearing on as many as 38 days. At 25 hearings, lasting on many occasions apparently for not more than 10 or 15 minutes, one or more witnesses were examined or cross-examined mostly only in part. Arguments similarly were spread over portions of six days.

We are aware that the Presidency Magistrates have much to do, and it is possibly for this reason that the procedure we have illustrated has been adopted. We cannot, however, too strongly condemn this piecemeal method of dealing with cases. So far from economising time, by necessitating the preparation of an unnecessarily voluminous record, by giving to parties and witnesses opportunities for consultation and for the concoction and fabrication of evidence, and otherwise, the system must necessarily result in much waste of public time, while entailing upon parties intolerable inconvenience, loss of time, and expense.

The procedure is further prejudicial to the course of justice inasmuch as the excessive and, in many cases, impossible cost involved must necessarily deter parties from seeking the best legal advice and

assistance. Moreover, it impairs the value of the findings ultimately arrived at, inasmuch as in a case dealt with in this manner and proceeding *pari passu* with a large number of cases similarly treated, it cannot be expected that when proceeding to judgment the Magistrate will have that lively recollection of the evidence so essential to a just conclusion.

We trust that the Presidency Magistrates will now abandon a procedure so calculated to bring odium upon their Courts, and will so arrange their business as to enable them to set apart for lengthy cases, certain specified days in each week. A trial once opened should then proceed throughout the day and, as far as possible, from day to day until completed. If so dealt with, the present case, which is essentially a simple case of hurt, should have been disposed of, and satisfactorily disposed of, in two or at most three hearings.

E. H. M. *Rule absolute.*

PRIZE COURT.

Before Jenkins Co.,

1914

Dec. 8.

Re CARGO *ex* S. S. RAPPENFELS.*

Confiscation—Cargo—Enemy ship—Cargo shipped by British subjects before declaration of war—War declared whilst cargo at sea—Cargoes consigned to German merchants, (in one instance to British merchant)—Destination (Enemy Port)—Contracts C.i.F.—Moneys advanced by British Banks against documents of title—Property in goods at time of capture.

On August 4th 1914, war was declared between Great Britain and Germany. Before the declaration of war H. S. N. C & Co., British subjects, had shipped some bales of jute by a German ship, the *S. S. Rappenfels* of the Hansa Line, and had consigned the goods to D. C. & Co., British merchants. G. & Co. and G. W. & Co. had also shipped goods by the same ship but had consigned the goods to German merchants.

The *Rappenfels* was captured at sea after the declaration of war and condemned as good and lawful prize at Colombo. The *Rappenfels* was sent to Calcutta to have the liability of the cargo to condemnation determined by the High Court at Fort William in Bengal.

Messrs. H. S. N. C. & Co., G. & Co. and G. W. & Co., submitted claims for the release of their goods. These claims were disputed by the Crown :—

Held, (i) that in determining the question of liability of the goods to confiscation, regard must be had to the property in the goods and not to the risk except so far as it may assist the Court in determining the answer to the question—"To whom did the goods belong at the time of capture"? (ii) That the sellers did not pass the property in the goods to the buyers at the time of appropriating the goods to the contract ; and, (iii) that in the circumstances the property in the goods was in the sellers, and they were not liable to be confiscated.

WAR was declared between Great Britain and Germany on the 4th August 1914. Before the declaration of war, among other British subjects, Messrs. Hari

* Original Civil Suit No. 8 of 1914 (In Prize).

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Singh Nihal Chand had shipped on board the S. S. *Rappenfels*, a German ship, some bales of jute and had consigned the goods to Messrs. Duncan Campbell & Company, British merchants, a firm carrying on business in London, but the destination of the goods was Hamburg, a German port. Messrs. Grossman & Company and Gladstone Wyllie & Company had also shipped goods by the same ship, but the consignees were German merchants, and are therefore since the declaration of war on 4th August 1914 enemy subjects.

The contracts were C. I. F. contracts; in accordance with the custom of the trade, the consignors received advances of money against the documents of title from Banks carrying on business in Calcutta, whose agents in London would, in the ordinary course of business, have realised the moneys due on the contracts from the consignees and then have made over to the consignees the documents of title to enable them to obtain delivery of the goods. The Banks recovered the advances from the consignors.

The *S. S. Rappenfels* (David Gardner Brown, master) sailed from Calcutta before the declaration of war and was captured on the high seas and taken to Colombo, where she was condemned as good and lawful prize. The *Rappenfels* was subsequently brought back to Calcutta in order that the question of the liability of the cargo to confiscation should be determined here. The Crown claimed the condemnation of the cargo.

The Advocate-General (*Mr. G. H. B. Kenrick*, K.C.), for the Crown. The property in the goods had passed, the goods are therefore enemy property. The test is the answer to the question—"On whom does the loss fall"? Capture is equivalent to delivery: see *The*

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Covenhagen (1); the loss therefore falls on the enemy subject. I adopt the arguments of the Attorney-General (Sir John Simon, K. C.) in the case of *The Miramichi* (The Times, November 3rd 1914).

[JENKINS C.J. The view put forward by the Attorney-General as reported in the Times of November 3rd, in his argument, does not agree with the views expressed by Bramwell and Cotton L.JJ. in the case of *Mirabita* v. *The Imperial Ottoman Bank* (2).]

The following cases were referred to: *The Packet de Bilboa* (3), *The Sally* (4), *The Atlas* (5), and *The Exchange* (6).

The character of goods on enemy ships depends upon the enemy character of their owner: *see* articles 58 and 59 of the Declaration of London; Lord Halsbury's Laws of England, Vol. XXV, page 188, paragraph 331; Westlake, part II, page 151, and to the case of *The Jonge Klassina* (7) mentioned by Westlake.

Mr. Pugh, for the claimants Messrs. Hari Singh Nihal Chand. This is a contract for goods to arrive. If goods do not arrive, buyers have no liability. The English law for the construction of contracts applies. Section 19 of the Sale of Goods Act covers this case; the property has not passed. The declaration of London, 1909, is quite clear: *see* Tiverton; Benjamin on Sale, 4th Edition, Chapter VI, page 345, on the rules for the determination of passing of property. Here before tender of documents there seems nothing to prevent sellers from diverting goods and appropriating

(1) (1799) 1 C. Rob. 288; 1 Eng. Pr. Cases 138.
(2) (1878) 3 Exch. D. 164 C. A.
(3) (1799) 2 C. Rob. 133; 1 Eng. Pr. Cases 209.
(4) (1795) 3 C. Rob. 300; 1 Eng. Pr. Cases. 28.
(5) (1801) 3 C. Rob. 299; 1 Eng. Pr. Cases 31.
(6) (1808) Edw. 39; 2 Eng. Pr. Cases 13.
(7) (1804) 5 C. Rob. 297; 1 Eng. Pr. Cases 485.

others: *see* cases cited by Benjamin, particularly to *Shepherd* v. *Harrison* (1); also to Scrutton on Charter Parties, 6th Edition, page 163. There is nothing in the Sale of Goods Act which contemplates risk being the test of property passing. The Declaration of London applies only to a state of war and policy towards neutrals. A subject's position must be as good as, if not better than, that of a neutral. *The Sally* (2) is in favour of the claimants; it is an authority that there is no right to condemn in a case like this, where the contract was made in time of peace or without contemplation of war.

The Advocate-General, in reply, contended that if Mr. Pugh's argument was right, there could never be any condemnation.

[In the other two cases the arguments were, *mutatis mutandis*, on similar lines.]

Cur. adv. vult.

JENKINS C.J. The *Rappenfels*, a German merchantship, was captured after the outbreak of hostilities by one of His Majesty's ships of war, and was in due course condemned as good and lawful prize by the Prize Court in Ceylon. The cargo however was released, not absolutely, but merely in order that its liability to condemnation might be considered and determined by this Court. This curious arrangement was the result of an understanding between claimants of the cargo and the authorities. With its wisdom I have no concern, nor do I propose to discuss its propriety, for the cargo is now within the limits of this Court's jurisdiction and no one has questioned the Court's competence to deal with it. On the contrary, an adjudication by the Court has been

(1) (1871) 5 E. & I. App. 116.

(2) (1795) 3 C. Rob. 300; 1 Eng. Pr. Cases 28.

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invited by all concerned. The *Rappenfels* sailed from Calcutta on the 2nd of August last, having on board the goods which are now the subject of adjudication. War had not then been declared, and it is conceded on behalf of the Crown that the ship sailed and the material contracts relating to these goods were made without any contemplation of war; and that nothing has been left undone that should have been done by the claimants. The ship's destination was Hamburg. The goods it carried belong to a number of persons, and the position of the several claimants is not in all cases identical. Certain typical claims have accordingly been selected as probably governing all or most of the rest. It is with these that I now propose to deal.

(i) *The claims of Messrs. Hari Singh Nihal Chand.*

These claimants carry on business in Calcutta, and have been treated for the purposes of this case as British subjects. Five lots of jute were shipped by them for Hamburg in performance of five contracts for sale. The terms of these contracts are set out in five separate notes each of which record that Messrs. Campbell & Co. of St. Mary Axe bought of the present claimants the jute described in the note upon the terms and conditions of the London Jute Association Contract C. I. F.

The contract is for jute "to arrive", and one of the terms is that the contract is to be considered cancelled for any portion not arriving owing to loss of vessel or other unavoidable causes, but to be valid for any portion that may be shipped or transhipped on sellers' account and arrive by any other vessel [clause 6 *(d)*].

The bill of lading was made out to the order of the consignors, the present claimants, and was endorsed by them in blank. With regard to three consignments the claimants drew bills of exchange. These, in

accordance with the usual course of business in Calcutta, they discounted with the Mercantile Bank transferring to the Bank at the same time the bills of lading as security for payment of the bills of exchange. The bills were forwarded to London. There they were not accepted but were returned with the result that the claimants have repaid the Bank. The bills of exchange with the bills of lading in respect of the remaining two consignments were passed through the Mercantile Bank for collection, but were not accepted. The result then is that the goods have not arrived and their price has not been paid, and the bills of lading are held by the claimants. Policies of insurance were taken out by the claimants but nothing turns on their terms or conditions.

In these circumstances, the Advocate-General contends that the goods were shipped at the consignee's risk, and on this assumption maintains, in accordance with instructions emanating from the Secretary of State, that they are liable to confiscation even though the British vendor is unpaid. His proposition is that risk, not property, is the test of liability to confiscation.

Even if this test be accepted, it is difficult to see how it can justify condemnation in this case, for the dealings with the goods only disclose sellers and buyers both of whom are British; and though under a C. I. F. contract, risk is ordinarily on the buyer, this is qualified in this case by the provision which makes arrival of the goods an essential term. The risk during the voyage was thus on the sellers to the extent indicated by this qualification and, in the events which have happened, has actually fallen on them. This conclusion would entitle the claimants to urge that even on the Advocate-General's own showing no case for condemnation has been made.

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But as some of the other claims may require a decision as to whether property or risk is to be regarded for the purpose in hand, it will be better to deal with that problem at this point.

Whatever may have been the view in former times, International Law now (apart from exceptional cases) regards property as the test of liability to confiscation in the case of neutrals and this finds direct expression in the 3rd Article of the Declaration of Paris where it is said, "*La marchandise neutre, a l'exception de la contrebande de guerre, n'est pas saisissable sous pavillon ennemi.*"

At the the same time the Declaration of London (Article 58) declares, "*Le caractere neutre ou ennemi des marchandises trouvées á bord d'un navire ennemi est determine par le caractere neutre ou ennemi de leur proprietaire.*"

Why then should the goods of a British subject shipped before war was even contemplated, be in a worse plight? No reason has been disclosed in the course of the argument.

It is true that these International Declarations deal only with enemy and neutral goods, and the treatment by a State of its subject's property is a concern not of International but of Municipal Law. But the position of a subject's goods has been considered and determined in a British Prize Court. Thus in *The Packet de Bilboa* (1), claim was successfully made by a British merchant for goods shipped on an enemy ship before the outbreak of hostilities with Spain.

Sir W. Scott, as he then was, said, "the question is, in whom is the legal title? Because if I should find that the interest was in the Spanish consignee I must then condemn, and leave the British party to

(1) (1799) 2 C. Rob 133 ; 1 Eng. Pr. Cases 209.

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apply to the Crown for that grace and favour which it is always ready to show." Later he said "under these circumstances, in whom does the property reside?" It no doubt is the case that reference is made to the incidence of risk, but as being a test of property and not as being in itself the occasion of confiscation or exemption.

That this is so, is, I think, apparent from the concluding portion of the judgment where it is said, "I must consider the property to reside still in the English merchant; it is a case altogether different from other cases which have happened on this subject *flagrante bello*. I am of opinion that, on all just considerations of ownership, the legal property is in the British merchant, that the loss must have fallen on the shipper, and the delivery was not to have been made till the last stage of the business, till they had actually arrived in Spain, and had been put into the hands of the consignee; and therefore I shall decree restitution of the goods to the shipper."

There may be cases in which the goods of a subject are in greater peril than those of a neutral, but that is where the Municipal Law sanctions the confiscation of the property of a subject for his illegal acts, as where he contravenes the law which forbids to a subject commercial intercourse with the enemy. But no such ground of confiscation is suggested here.

The conclusion then to which I come is that in determining the question of liability to confiscation even in the case of a subject I must have regard to the property in the goods and not the risk except so far as it may assist me in determining where the property is. To whom then did the goods belong at the time of capture?

They were no doubt sold under a C. I. F. contract, but it was a contract "to arrive" and it was an

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express term that it should be "considered cancelled for any portion not arriving owing to loss of vessel or other unavoidable causes."

So, even if risk be regarded as a valuable clue to property, in this case the risk during the voyage was on the seller to the extent indicated by this qualification.

But what appears to me to be decisive of this case, in view of the well-known mercantile usage that prevails in Calcutta, is the mode in which the sellers dealt with the bills of lading. They were taken to their own order and after the dealings I have already described, still are in the seller's possession.

The fair presumption in the circumstances of this case is that the sellers intended to retain and in fact did retain the property in the goods. This was a necessary reservation for the purpose of securing that method of commercial finance commonly employed by Calcutta shippers.

It will not be inappropriate to quote in support of this view certain remarks of Mr. Benjamin to be found in Chapter VI, Book II, of his Treatise on Sale of Goods (4th Edition, p. 345):

"If A, in New York, orders goods from B, in Liverpool, without sending the money for them there are two modes usually resorted to among merchants, by which B may execute the order without assuming the risk of A's inability or refusal to pay for the goods on arrival. B may take the bill of lading, making the goods deliverable to his own order, or that of his agent in New York, and send it to his agent, with instructions not to transfer it to A except on payment for the goods. Or B may not choose to advance the money in Liverpool, and may draw a bill of exchange for the price of goods on A, and sell the bill to a Liverpool banker, transferring to the banker

the bill of lading for the goods to be delivered to A on due payment of the bill of exchange. Now in both these modes of doing the business, it is impossible to infer that B had the least idea of passing the property to A, at the time of appropriating the goods to the contract. So that although he may write to A, and specify the packages and marks by which the goods may be identified, and although he may accompany this with an invoice, stating plainly that these specific goods are shipped for A's account, and in accordance with A's order, making his election final and determinate, the property in the goods will nevertheless remain in B, or in the banker, as the case may be, till the bill of lading has been endorsed and delivered up to A."

So here, I think, it is impossible to infer that the sellers had the least idea of passing the property to the buyers at the time of appropriating the goods to the contract, and, were I sitting in the High Court's ordinary jurisdiction, I should hold without doubt that the property remained in the sellers.

Is there then any reason why I should not come to the same conclusion sitting in Prize? For I recognize that this question of property may be viewed differently in Prize from what it would be in a Court sitting in its ordinary jurisdiction and that any disposition or reservation of property made *flagrante bello* which would defeat the ordinary rules of Prize Law is disregarded : *The Abo* (1).

But here all arrangements were made in time of peace and without any contemplation of war, and there is no suggestion of any fraud on the Prize Law. There is ample authority to support this distinction in favour of transactions concluded in time of peace.

(1) (1854) Spinks 42 ; 2 Eng. Pr. Cases 285.

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Thus in *The Sally* (1), the Commissioners of Appeal said. "It has always been the rule of the Prize Courts that property going to be delivered in the enemy's country and under a contract to become the property of the enemy immediately on arrival if taken *in transitu* is to be considered as enemies' property. When the contract is made in time of peace or without any contemplation of war no such rule exists."

The cases of *The Vrow Margaretha* (2), *The Packet de Bilboa* (3), and *The Vrow Anna Catharina* (4), may also be cited to the same effect.

I therefore hold, in the circumstances of this case, that the property in the goods is in the sellers, and it follows, in the absence of any illegality, that they are not liable to be confiscated.

I accordingly decline to condemn the goods and direct them to be restored for the use of the owner's thereof.

(ii) *Messrs. Grossman & Co.*

This claimant is a British India Company and its claim is in respect of goods shipped under four bills of lading.

The purchaser in each case was J. C. Gustav Schmidt, and the destination of the goods was Hamburg.

The bills of lading were in each case made out to the order of and retained by the company in accordance with the commercial usage of Calcutta, to which I have already alluded. For the reasons I have explained in dealing with the first claim, I hold that the property remained in the seller, and as all the material transactions were prior to the contemplation

(1) (1795) 3 C. Rob. 300 ; 1 Eng. Pr. Cases 28.
(2) (1799) 1 C. Rob. 336 ; 1 Eng. Pr. Cases 149.
(3) (1799) 2 C. Rob. 133 ; 1 Eng. Pr. Cases 209.
(4) (1805) 5 C. Rob. 15 ; 1 Eng. Pr. Cases 412.

of war, I decline to condemn the goods and direct restoration.

(iii) *Messrs. Gladstone Wyllie & Co.*

This claim is in respect of jute shipped on the *Rappenfels* in pursuance of three orders. The first of these orders was from Luther & Seyfert of Bremen for the shipment of goods from Calcutta in through-freight to Messrs. Luther & Seyfert Ld., Accra; the 2nd was from Carl Tessman of Hamburg for the shipment of goods from Calcutta in through-freight to Lagos; and the 3rd was from Carl Tressman for the shipment of goods from Calcutta to Hamburg.

In each case the bill of lading was made out to the order of Messrs. Gladstone Wyllie & Co. It is proved in this case that the bills of lading were retained by these claimants and are still in their possession as the Banks refused to discount bills.

For the reasons I have stated at length in dealing with Messrs. Hari Singh Nihal Chand's claim, I hold the property in the goods is in Messrs. Gladstone Wyllie & Co. and, as in this case too, all the transactions relating to the goods were prior to the contemplation of war, I decline to condemn the goods and direct their restoration.

The order of restoration will in each case be subject to the payment of proper charges, if any.

W. M. C.

Attorney for the Crown: *C. H. Kesteven.*

APPELLATE CIVIL.

Before Fletcher and Richardson JJ.

1914

May 7.

KUNJA BEHARI SEAL

v.

DURGA PRASAD SINGH.*

Mineral Rights—Moghali Brahmottar—Grant.

Moghali Brahmottar grant of a mauza does not pass the minerals under it to the grantee.

Hari Narayan Singh Deo v. *Sriram Chakravarti* (1) and *Jyoti Prasad Singh* v. *Lachipur Coal Co.* (2) followed.

Sonet Kooer v. *Himmut Bahadoor* (3) distinguished.

APPEAL by the plaintiff, Kunja Behari Seal.

This appeal arose out of a suit for a declaration of title and recovery or confirmation of a share of the subsoil in the property in suit. The ancestor of the defendant, Raja Durga Prasad Singh, granted mauza Jitpur as a *Moghali brahmottar* to the ancestor of the Tewari defendants but subject to the payment by him of an annual sum of Rs. 16 which the Raja had to pay to the Government as revenue for the said mauza. By various conveyances from the heirs of the above grantee, the present plaintiff became entitled to a 15 annas, 2 gandas, 1 kora share of the subsoil of the said mauza and he brought this suit for declaration of his title thereto and for recovery or confirmation of his possession therein.

* Appeal from Original Decree, No. 197 of 1911, against the decree of Advaita Prasad Dey, Subordinate Judge of Manbhum, dated March 11, 1911.

(1) (1910) I. L. R. 37 Calc. 723. (2) (1911) I. L. R. 38 Calc. 845.
(3) (1876) I. L. R. 1 Calc. 391.

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The zemindar defendant and other defendants claiming the subsoil under him contended that the Tewaris were merely temporary *ijaradars* and not *brahmottardars*; that their interest in the mauza was sold in execution of decrees for arrears of rent and purchased by others to whom the subsoil rights were subsequently conveyed by the zemindar.

The Subordinate Judge came to the conclusion that the Tewaris were not *ijaradars* but *brahmottardars*; that though ordinarily the grant of a *brahmottar* meant a gift to a Brahmin of the entire rights of the donor, there may, indeed, be limited grants, and that where, as in the present case, a rent, however small or permanent was reserved, the donor did not cease to be the owner, and the grant was not a gift but a lease or a permanent tenure and that, therefore, such a grant could not and did not convey to the grantee the right to the mines unopened at the time of the grant.

Mr. B. Chakravarti, *Babu Shib Chandra Palit* and *Babu Hira Lal Sanyal*, for the appellant.

Babu Mahendra Nath Roy, *Babu Lalit Mohan Ghose* and *Babu Tarkeshwar Pal Chowdhry*, for the respondents.

Cur. adv. vult.

FLETCHER J. The only question arising for our decision in the present appeal is whether the minerals lying beneath the mauza Jitpur in the pargana of Jheria passed to the ancestor of the Tewari defendants by a *Moghali brahmottar* grant at a rent of Rs. 16 a year by the ancestor of the defendant No. 1. The plaintiff has acquired a 15 annas, $2\frac{1}{4}$ gandas share in the subsoil of the mauza from the Tewaris and brought the suit for the declaration of his title to such share. His claim was resisted by the contesting defendants on various grounds, the only one of which

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it is now material to consider is the defence that the *brahmottar* granted by the ancestor of the defendant No. 1 to the ancestor of the Tewari defendants did not pass the minerals to the grantee. The evidence before us is small and the case largely depends upon what are the proper inferences of fact to be drawn from certain admitted facts.

There is no document evidencing the grant of the *brahmottar*, although it would appear that it was granted more than 100 years ago. At that time it is not probable that any one thought of there being coal under these lands. In an attempt to prove the origin of the *brahmottar* grant the plaintiff called the defendant No. 17 to prove the origin of the grant His statement was that he heard from his grandmother, that his ancestor had become degraded for some spiritual services rendered to the ancestor of the defendant No. 1, and, therefore, the former Raja made a gift of the whole of his rights in the mauza. The learned Judge very properly refused to accept this statement as proving the origin of the grant.

The only facts proved are, *first*, that the grant was a *Moghali brahmottar* grant; and, *secondly*, that it has been held for more than 100 years at the same rent of Rs. 16. From these facts the learned Judge drew the inference, that the *brahmottar* was a permanent tenure held at a rent of Rs. 16 a year. He, however, came to the conclusion that such a grant did not transfer the minerals to the grantee. It is not suggested in the present case that there were any mines opened on the property at the date of the grant, nor that the plaintiff or the persons from whom he derives title have a prescriptive right to work any of the minerals under the property. The learned Judge, therefore, came to the conclusion that the plaintiff had not shown that the former Raja parted with the

minerals when he made the *brahmottar* grant to the Brahmin, Behari Tewari.

I think the learned Judge in this view was correct. The present case appears to me to be covered by authority.

The first case to which we have been referred is the case of *Hari Narayan Singh Deo* v. *Sriram Chakravarti* (1), which is a decision of the Judicial Committee of the Privy Council. The contest in that case was between the zemindar and certain Goswamis, the *shebaits* of an idol. Lord Collins in delivering the opinion of their Lordships made the following remarks:—"On the whole, it seems to their Lordships that the title of the zemindar Raja to the village Petena as part of his zemindari before the arrival of the Goswamis on the scene being established, as it has been, he must be presumed to be the owner of the underground rights thereto appertaining in the absence of evidence that he ever parted with them, and no such evidence has been produced." I think that decision covers the case now before us. There can be little, if any, distinction between the case of a *Moghali debutter* and a *Moghali brahmottar* grant. It has, however, been argued before us that that decision does not apply to the present case, having regard to certain remarks made by Lord Collins in an earlier portion of the judgment. But a perusal of the judgment convinces me that in using the expression "occupancy right", their Lordships were not considering whether the idol was a tenure-holder, or a raiyat with an occupancy right or a raiyat with a non-occupancy right. It seems manifest to me that their Lordships were using this expression as opposed to the right of the zemindar who had the proprietary interest.

(1) (1910) I. L. R. 37 Calc. 723.

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KUNJA BEHARI SEAL v. DURGA PRASAD SINGH.

FLETCHER J.

The next case that was cited to us was that of *Jyoti Prasad Singh* v. *Lachipur Coal Co.*(1). The facts in that case are indistinguishable from the present. The grant in that case was a *Moghali brahmottar* grant. The learned Judges held that such a grant, even though permanent, did not pass the mines unopened at the date of the grant. Next comes the case of *Durga Prasad Singh* v. *Braja Nath Bose* (2), which was also a decision of the Judicial Committee of the Privy Council. The contest in that case was between the persons claiming title from a Digwar and the zemindar, and it was held that the minerals were vested in the zemindar. Against these decisions the appellant relies on the case of *Sonet Kooer* v. *Himmut Bahadoor* (3). But the only point decided in that case was that on the failure of heirs of a person to whom a permanent tenure had been granted the escheat was to the Crown and not to the zemindar. But that case has nothing to do with the question of what was granted to the tenure-holder in the first instance. I think, therefore, that the learned Subordinate Judge came to a correct conclusion when he held that the *Moghali brahmottar* grant to the ancestor of the Tewari defendants did not pass the minerals under the mauza.

Accordingly the present appeal fails and must be dismissed with costs. We allow only one set of costs to be divided between the different sets of respondents who have appeared. The respondents are not entitled to the paper-book costs incurred by them.

RICHARDSON J. I agree that the case is covered by authority and that the appeal must be dismissed.

S. K. B. *Appeal dismissed.*

(1) (1911) I. L. R. 38 Calc. 845. (2) (1912) I. L. R. 39 Calc. 696.
(3) (1876) I. L. R. 1 Calc. 391.

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

MONIJAN BIBI

v.

DISTRICT JUDGE, BIRBHUM.*

1914.

May 15

Mahomedan Law—Marriage—Minor—Guardian for marriage, functions and position of—Marriage of minor ward, necessity of consent of Court for—Functions of Court in such cases—Procedure to be followed by the guardian for marriage of Mahomedan infant—Guardians and Wards Act (VIII of 1890) ss. 4(2), 24, 25, 26, 41, sub-s. (1) cl. (d), 42 sub-s. (1), 47 cl. (a)—Practice—Order of District Judge not appealable.

In the case of Mahomedans, the words "disposal in marriage" cannot be treated as included in the general words "such other matters as the law to which the ward is subject, requires" occurring in s. 24 of the Guardians and Wards Act.

In the absence of express statutory provision to this effect, it cannot reasonably be held that the Mahomedan law on the subject of guardianship in marriage has been abrogated by implication by s. 24 of the Guardians and Wards Act

Where the District Judge of Birbhum, in the matter of the disposal in marriage of a Mahomedan female minor in respect of whose person and property guardians had been appointed by him, proceeded to select a suitable husband for the minor from the preliminary list of possible candidates prepared by his Hindu Nazir (the guardian of the property), in opposition to the selection of the guardian of the person (her mother), and of the guardian for marriage (her father's step-brother), both of whom had initiated these proceedings:

Held, that the proceedings before the District Judge had been throughout irregular.

* Appeal from Original Order, No. 74 of 1913, and, in the alternative, Civil Rule No. 221 of 1913, against the order of B. C. Mitter, District Judge of Birbhum, dated Dec. 6, 1912.

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It was not the function of the District Judge to act as match-maker. But a ward of Court could not marry without the consent of the Court.

Eyre v. *Shaftesbury* (1), *Jeffrys* v. *Vanteswarstwarth*(2), *Tombes* v. *Elers* (3), *Subhadra Koer* v. *Dhajadhari Goswami* (4) followed.

Bai Diwali v. *Moti Karson* (5) disapproved.

Held, further (after laying down the proper procedure to be followed in cases of this description), that the choice had to be made in the first instance by the guardian for marriage, and if on the materials before the District Judge he was satisfied that the marriage was not unsuitable, he was to sanction it.

Held, also, that the order of the District Judge was not open to appeal, as s. 47 cl. (*a*) of the Guardians and Wards Act read with s. 43, sub-s. (*1*) and ss. 24, 25 and 26 did not cover the case.

APPEAL by Monijan Bibi and another and, in the alternative, Civil Rule on behalf of the said Monijan Bibi against the District Judge of Birbhum as the opposite party.

The material facts connected with this case are briefly as follows. By an order of the District Judge of Birbhum, dated 12th February 1910, one Monijan Bibi had been appointed guardian of the person of her minor daughter Asia Bibi, the Nazir, who was a Hindu, being appointed guardian of the property. On the 22nd May 1912, an application was made to Court by the mother and one Elat Mullick, a step-brother and nearest agnate of the said minor's father who claimed to be the guardian for marriage, for directions as to a suitable marriage of the infant. They had selected one Ishaq, and an objection was taken to him by the minor's father's cousin. The minor also approved of Ishaq before the District Judge. The Nazir, however, as ordered by the Court, submitted a report, after exhaustive enquiry, stating the qualifications of various eligible young men of the village who

(1) (1723) 2 P. Wms. 103, 112.
(2) (1740) Barn. Ch. 141, 144.
(3) (1747) 1 Dick. 88.
(4) (1911) 15 C. L. J. 147.
(5) (1896) I. L. R. 22 Bom. 509.

could be considered suitable. Ultimately the District Judge himself proceeded to select a suitable husband for the girl from the list prepared by the Nazir, and agreeing with the opinion of the minor's maternal grandfather, by his order, dated 6th December 1912, sanctioned Asia's marriage with one Belzar, the son of a respectable co-villager named Rahil, holding that Elat who claimed to be the minor's guardian for marriage had no *locus standi* in those proceedings. Being aggrieved by this order the said Monijan Bibi and Elat Mullick preferred an appeal to the High Court; and in the alternative Monijan Bibi filed a motion under s. 115 of the Code of Civil Procedure and obtained a Rule on the District Judge of Birbhum to show cause why the order complained of should not be set aside.

Babu Naresh Chandra Sinha, for the appellants and petitioner. Both the paternal uncle and mother of the minor agree that she should be married to a certain person. The District Judge had no jurisdiction to interfere with their discretion and to direct that the minor be married to some other person. Under the Mahomedan law, the paternal uncle and the mother are preferential guardians for marriage. The Kazi, whose functions are now exercised by the District Judge, is the guardian for marriage only when the uncle or the mother are dead: *vide* Ameer Ali's Mahomedan Law, Vol. II, pp. 280-282 (3rd edition); Shama Charan Sircar, Vol. I, p. 329; Tyabjee's Mahomedan Law, pp. 91, 92; Baillie's Digest pp. 45-46.

No one appeared for the opposite party.

Cur. adv. vult.

MOOKERJEE AND BEACHCROFT JJ. We are invited to set aside, in the exercise of our appellate or of our

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revisional jurisdiction, an order, which purports to have been made by the District Judge under the Guardians and Wards Act, for the marriage of a Mahomedan girl, in respect of whose person and property guardians had been previously appointed by him. On the 12th February 1910, the District Judge appointed the mother of the infant as guardian of her person and the Nazir of the Court as the guardian of her properties. The order, however, was not communicated to the Nazir, and he does not appear to have had any hand in the management of the estate, till quite recently, when the fact was discovered that the Nazir had never been apprised of his appointment. The proceeding now before us was initiated on the 22nd May 1912, when an application was made to the Court by the mother and by another person who claimed to be the half-brother of the father of the infant, for directions as to a suitable marriage of the girl. Objection was taken by a cousin of the father of the infant, who intimated to the Court that the selection of a bridegroom as made by the applicants was entirely unsuitable. The District Judge thereupon directed the attendance of all near relations of the girl, and also ordered the girl to be produced in Court if the mother had no objection. On a later date, the girl was brought before the Court; the District Judge then directed his Nazir, Babu Saradindu Chakravarti, a Hindu gentleman, to go to the village and after consultation with persons interested in the welfare of the minor, to submit a list of likely bridegrooms, stating their qualifications and position in society and making his recommendation with reasons. Objection was taken by the mother and the alleged uncle to the adoption of this course on the ground that it involved a supersession of the person entitled under the Mahomedan law to act as the guardian for marriage. No heed was paid to this, and

on the 16th August, the Nazir submitted his report. On the 27th September, the girl was produced again before the Court and she expressed her preference for a young man named Ishak. On the 4th October, the District Judge further considered the matter, and although he came to the conclusion that the Court could not undertake to perform the functions of a match-maker, he called upon the mother to nominate three of the young men mentioned in the report of the Nazir. On the 6th December, the District Judge recorded in the order sheet that the mother had failed to comply with the order of the 4th October, and he accordingly proceeded to select a suitable husband for the girl on the basis of the report submitted by the Nazir. This order is assailed before us as made without jurisdiction. In our opinion, the proceedings before the District Judge have been throughout irregular.

The Guardians and Wards Act does not make specific mention of the disposal in marriage of an infant in respect of whose person a guardian has been appointed by the Court, although section 41, sub-section (*1*), clause (*d*), provides that the powers of a guardian of the person cease in the case of a female ward by her marriage to a husband who is not unfit to be guardian of the person, or if the guardian was appointed or declared by the Court, by her marriage to a husband who is not in the opinion of the Court so unfit. The term "guardian" is defined in section 4, clause (*2*) to mean a person having the care of the person of a minor or of his property or of both his person and property. Section 24 then prescribes the duties of a guardian of the person in these terms: "A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which

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the ward is subject requires". It is remarkable that while the Legislature makes specific mention of support, health and education, no reference is made to the marriage of the minor. If we assume that the individual who has by law the right and duty of disposing of a boy or girl in marriage may be said to have for that limited purpose the care of his or her person, the question remains whether "disposal in marriage" can be treated as included in the general words, "such other matters as the law to which the ward is subject requires", which find a place in the concluding portion of section 24. The answer must plainly be in the negative in the case before us; we need not express any opinion as to what the answer may be in cases where the parties are not Mahomedans. In the first place, under the Mahomedan law, which applies to the parties before the Court, the guardian of the person of an infant is not necessarily the guardian for the marriage of the girl. In the second place, the Mahomedan law does not require that the guardian should provide suitable marriage for his ward, though it gives him the power to contract a marriage for the infant. The Mahomedan law does not impose upon guardians any religious obligation to provide suitable marriages for their wards; indeed, their power is so restricted that, where a minor has been given in marriage by a guardian other than the father or paternal grandfather, the minor has what is called the option of puberty, or option of repudiation, on attainment of age. We have, therefore, two fundamental positions under the Mahomedan law, namely, *first*, the right of giving a male or female minor in marriage falls upon a line of guardians different from that to which the management of his property is entrusted and also from that to which the custody of the person is confided; and, *secondly*, that although the intervention

of a guardian is an essential condition to the validity of the marriage of a minor, it is not obligatory upon the guardian of the person, nor even upon the guardian for marriage, to provide a suitable marriage for the ward [Macnaghten, Chapter VII, Articles 14, 16; Baillie, Book I, Chapter IV, page 45; Hamilton's Hedayah, Volume I, Book I, Chapter II, pages 36, 37 and 39; Ameer Ali, Volume II, pages 280—282 (third edition); Shama Charan Sircar, Volume I, page 329; Abdur Rahman, Articles 34—37 and 41 and 42; Abdur Rahim, page 331]. It cannot reasonably be held that the Mahomedan law, on the subject of guardianship in marriage, has been abrogated by implication by section 24 of the Guardians and Wards Act. One would have expected to find a specific statutory provision to this effect if the Legislature really intended to interfere with the rule of Mahomedan law which assigns the function of guardianship in marriage of an infant, under the name of *jabr*, to relatives who are not necessarily those entitled to the general care and direct custody (*hizanat*) of the person of the infant. The view we take is supported by the opinion of *Sir Roland Wilson* (*Anglo-Mahomedan Law*, Arts. 90 and 117).

The question next arises, What is the true function of the District Judge in the matter of the disposal in marriage of a Mahomedan minor in respect of whose person a guardian has been appointed by him? We are not prepared to accept the extreme view that the marriage of an infant, who is a ward of Court, may be allowed to take place without the sanction or even the knowledge of the District Judge, although such view appears to have been indicated in *Bai Diwali* v. *Moti Karson* (1). It would, we think, be

(1) (1896) I. L. R. 22 Bom. 509.

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contrary to first principles to hold that, although a minor is a ward of Court, an obviously unsuitable marriage may be arranged for her, while the Court is powerless to prevent what would manifestly be an irrevocable act permanently injurious to her best interests for life. If this view were not maintained, grave complications might also arise, because under section 41, sub-section (*l*), cl. (*d*), the powers of the guardian of the person cease, when such guardian has been appointed or declared by the Court, only when the marriage has taken place with a husband who is not, in the opinion of the Court, unfit to be guardian of the person of the girl. This clearly indicates the desirability, if not the absolute necessity, of the sanction of the Court, before the marriage is arranged and solemnised. We hold accordingly that a ward of Court cannot marry without the consent of the Court. This indeed has been recognised as an elementary principle in the law of England [*Eyre* v. *Shaftesbury* (1), *Jeffrys* v. *Vanteswarstwarth* (2), *Tombes* v. *Elers* (3)] and it has been repeatedly held that if a proposed marriage is unsuitable, the Court can, as representing the Sovereign in whom the guardianship of all infants is, in theory, vested, restrain the marriage, even though the guardian or the father has given his consent: *Gordon* v. *Irwin* (4), *Wellesley* v. *Beaufort* (5) affirmed by the House of Lords *Wellesley* v. *Wellesley* (6). This view was accepted as applicable to the case of a Hindu minor for whom a personal guardian has been appointed by the Court, in *Subhadra Koer* v. *Dhajadhari Goswami* (7), where it was ruled that marriage or connivance at marriage

(1) (1722) 2 P. Wms. 103, 112.
(2) (1740) Barn. Ch. 141, 144.
(3) (1747) 1 Dick. 88.
(4) (1781) 4 Brown P. C. 355.
(5) (1827) 2 Russ. 1, 29.
(6) (1828) 2 Bligh N. S. 124: 1 Dow & Cl. N. S. 152
(7) (1911) 15 C. L. J. 147.

with a ward of Court, without consent of the Court, is a contempt of Court liable to be severely punished.

The proper procedure to be followed in cases of this description may now be briefly described. The guardian for marriage of the infant, who may have negotiated for the marriage, must apply to the District Judge for his sanction. Notice of the application should be given to the infant, to the guardian of person if he happens to be different from the guardian for marriage, and also to such relations of the minor as the Judge may deem necessary. He will then consider the objections and suggestions, if any, and then determine whether the proposal of the guardian for marriage is for the true welfare of the minor or whether the marriage is unsuitable by reason of incongruity of age, inequality of rank and fortune or any like reason. If, on the materials before the District Judge, he is satisfied that the marriage is not unsuitable, he will sanction it.

The order of the District Judge in the case before us, tested in the light of the principles just explained, is clearly unsustainable. No doubt, at one stage of the proceedings he rightly took the view that it is not the function of the District Judge to act as a match-maker, but at a later stage he adopted measures quite contrary to the principle he had laid down. There was also a dispute before him as to who was entitled under the Mahomedan law to act as guardian for the marriage of the minor. This he did not decide as he should have done, but superseded both the claimants, appointed his Nazir to hold an enquiry in the village and to make a preliminary selection of possible bridegrooms, and finally called upon the mother to select three from amongst the persons named by the Nazir. When the mother, who was apparently treated as the guardian for marriage, could not make the

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selection, apparently for the reason that she did not consider any of the young men named by the Nazir quite suitable, the District Judge proceeded to make his own choice. This was clearly an irregular procedure. It is difficult to see why the choice should be restricted to young men of the particular village, and why the guardian for marriage should be limited to the preliminary list of possible candidates prepared by the Nazir. The choice has to be made in the first instance by the guardian for marriage, whoever he may be, and the true function of the District Judge is to test whether the selection made by the guardian for marriage is or is not suitable. The District Judge does not appear to have realised what responsibility would be involved, if he had, with or without the assistance of his Nazir, to select the most suitable bridegroom or bride, as the case might be, for every infant in the district in respect of whose person a guardian might have been appointed by him. Nor did the District Judge realise that, while under the Mahomedan law none but a Moslem can act as the guardian for marriage of a Mahomedan minor, the procedure he has followed has led to the supersession of such guardian by a Hindu gentleman, who *primâ facie* would not have an intimate knowledge of what would be deemed suitable in Mahomedan society.

The only other question which requires examination is whether the order of the District Judge is open to appeal. We are of opinion that section 47, cl. (*1*) of the Guardians and Wards Act, read with section 43, sub-section (*1*), and sections 24, 25 and 26, does not cover the case; consequently the order is not open to appeal and can be set aside only in the exercise of our revisional jurisdiction.

The result is that the appeal is dismissed but the Rule is made absolute, and the order of the District

Judge discharged. The records will be returned to him to enable him to take such further steps, if any, as the parties interested may desire him to adopt in accordance with the principles explained above.

G. S. *Appeal dismissed: Rule absolute.*

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APPELLATE CIVIL.

Before Fletcher and Richardson JJ.

ESAHAQ CHOWDHRY

v.

ABEDUNNESSA BIBI.*

1914

June 9.

Mahomedan Law—Gift made in lieu of dower—Nature of such gift.

The provisions of the Mahomedan Law applicable to gifts, made by persons labouring under a fatal disease, do not apply to a so-called gift made in lieu of a dower-debt which is really of the nature of a sale.

Ghulam Mustafa v. *Hurmat* (1) followed.

Abbas Ali v. *Karim Bakhsh* (2) and *Bibi Janbi* v. *Hazrath Saib* (3) referred to.

SECOND Appeal by Esahaq Chowdhry and another, the plaintiffs.

This appeal arose out of a suit brought by the plaintiffs for a declaration that the *kabala* set up by the defendant No. 1 was collusive and invalid and not binding upon them. One Chowdhry Ubaidul Huq, being entitled to and in possession of certain

* Appeal from Appellate Decree, No. 3951 of 1912, against the decree of Bejoy Gopal Bose, Subordinate Judge of Burdwan, dated Sep. 23, 1912, affirming the decree of Achinta Nath Mitra, Munsif of Burdwan, dated Jan. 17, 1911.

(1) (1880) I. L. R. 2 All. 854. (2) (1908) 13 C. W. N. 160.
(3) (1910) 21 Mad. L. J. 958.

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properties, died on the 10th of Jaistha 1316 leaving him surviving his widow, the defendant No. 1, two daughters, defendants Nos. 2 and 3, and 2 brothers, plaintiffs Nos. 1 and 2, as his heirs. The plaintiffs, being entitled to 3-anna, 6-ganda, 2-kara, 2-kranti share of the properties left by their brother, Ubaidul Huq, attempted to enter into the possession of the same but were resisted by the defendant No. 1 on the allegation that her husband had before his death transferred all his properties to her in liquidation of her dower-debt. Hence the suit by the plaintiffs to recover possession of the legal share after declaration that the *kabala* propounded by the defendant No. 1 was fraudulent and as such it was not binding upon the plaintiffs The defendant No. 1 pleaded, amongst other defences, that the alleged *kabala* was a *bona fide* document for consideration. The defendants Nos. 2 and 3 filed a written statement supporting the case set up by the defendant No. 1.

The Court of first instance dismissed the suit with costs. Then the plaintiffs appealed to the Subordinate Judge of Burdwan who also dismissed the appeal with costs. Hence this second appeal.

Babu Dwarka Nath Chuckerbutty (with him *Babu Bipin Bihari Ghose* and *Babu Pyari Mohan Chatterjee*), for the appellants, contended that the rules of Mahomedan Law, respecting death-bed gifts, were applicable to sales effected on death-bed. In support of this contention he relied upon Case XII, p. 177 of Macnaghten's Mahomedan Law.

Dr. Rashbehari Ghose (with him *Babu Prabodh Chandra Datta*), for the respondents, submitted that rules relating to death-bed gifts had no application whatever to sales effected on death-bed. When once a sale was effected, provided it was not tainted with fraud

or collusion, the sale was good and binding. It could not be impeached on any other ground. Here the finding is clear that the sale was a real transaction and hence no other question can arise: *Ghulam Mustafa* v. *Hurmat* (1), *Abbas Ali* v. *Karim Baksh* (2), *Bibi Janbi* v. *Hazarath Saib* (3).

Babu Dwarka Nath Chuckerbutty, in reply.

FLETCHER J. This is an appeal from a judgment of the learned Subordinate Judge, Second Court, of Burdwan, dated the 23rd September 1912, affirming the decision of the Munsif. The suit was brought by the plaintiffs for a declaration that the *kabala* set up by the defendant No. 1 was collusive and invalid and not binding upon them. The question that we have got to decide lies within a narrow compass. The defendant No. 1 is the widow of a Mahomedan gentleman. This Mahomedan gentleman had agreed to pay a certain sum as dower to the said defendant. The dower was deferred dower; but it is the common case—and so found by the learned Subordinate Judge—that a portion of the dower was outstanding at the date of the execution of the *kabala* in question. The deceased gentleman executed a conveyance of this property to the defendant in satisfaction of her dower-debt. A question has been raised before us, whether the principles of the Mahomedan Law, with reference to the death-bed illness which apply to gifts apply also to a sale when the sale is for dower-debt. The matter is not *res integra*. The very matter has already been dealt with in the Allahabad High Court, see *Ghulam Mustafa* v. *Hurmat* (1) where the learned Judges held that the provisions of the Mahomedan Law applicable to gifts made by persons

(1) (1880) I. L. R. 2 All. 854. (2) (1908) 13 C. W. N. 160,
(3) (1910) 21 Mad. L. J. 958.

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labouring under a fatal disease do not apply to a so-called gift made in lieu of the dower-debt which is really of the nature of a sale. That case is exactly on all fours with the present, and it has been followed and approved of both by this Court and the Madras High Court: see *Abbas Ali* v. *Karim Baksh* (1), *Bibi Janbi* v. *Hazarath Saib* (2). We are of opinion that the decision in the case of *Ghulam Mustafa* v. *Hurmat* (3) is correct, and we think we ought to follow the same. It does not seem to us from a perusal of the books that have been handed up to us in the course of the argument, that the principles relating to a gift apply to a transaction such as the one that is now before us. In our opinion, the learned Judge of the lower Appellate Court came to a correct conclusion. The present appeal, therefore, fails and must be dismissed with costs.

RICHARDSON J. I agree. Case XII, p. 177 of Macnaghten's Mahomedan Law, appears to be distinguishable from the present case, inasmuch as it is not stated there that the sale was in consideration of a dower-debt.

S. K. B. *Appeal dismissed.*

(1) (1908) 13 C. W. N. 160. (2) (1910) 21 Mad. L. J. 958.
(3) (1880) I. L. R. 2 All. 854.

CRIMINAL REVISION.

Before Sharfuddin and Teunon JJ.

ACHAMBIT MANDAL

v.

MAHATAB SINGH.*

1914

June 16.

Complainant—Absence of complainant—Case called on by mistake on date, not fixed for hearing—Order of acquittal—Effect of such order—Jurisdiction of Magistrate to proceed with trial thereafter—Criminal Procedure Code (Act V of 1898), s. 247.

An order of acquittal, under s. 247 of the Criminal Procedure Code, passed by mistake on a date not fixed for the hearing of the case, for absence of the complainant, is a mere nullity, and does not debar the Magistrate from proceeding with the trial on the discovery of the error.

H. C. Proceedings, 17 Aug. 1875 (1) followed.

Suresh Chandra Sinha v. *Banku Sadhukhan* (2) distinguished.

The petitioner, Achambit Mandal, filed a complaint under ss. 147, 323, 379 and 426 of the Penal Code against Mahatab Singh and others, on the 22nd December 1913, before the Sub-divisional Officer of Madhipura. The petitioner was examined and processes were issued against the accused under ss. 426 and 352, of the Penal Code, the hearing of the case having been fixed for the 16th January 1914. It appeared that on the 10th January the case was called on, through a mistake on the part of the *peshkar*, and the complainant being absent, the Magistrate passed the following order "Accused acquitted under s. 247, Cr. P. C." On the 16th the case was called on again when the complainant was present but not the accused, and it was then discovered that an order of acquittal

* Criminal Revision No. 715 of 1914 against the order of J. E. Scott, Sessions Judge of Bhagalpur, dated March 31, 1914.

(1) (1875) 2 Weir 307. (2) (1905) 2 C. L. J. 622.

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had been passed on the previous date, whereupon the Magistrate recorded the following order "The date was obviously for 16th January, and the order of the 10th was wrong. Accused absent, put up on 20th." The case was taken up without objection and heard on various dates, and the accused were convicted on the 9th March under s. 147 of the Penal Code, and sentenced to rigorous imprisonment for one month and a fine of Rs. 20 each, and in default to 15 days' further imprisonment.

The accused thereupon appealed to the Sessions Judge of Bhagalpur, who acquitted them by his order, dated 31st March 1914, which was as follows:—

The learned Subdivisional Officer, by his order of acquittal, dated 10th January 1914, debarred himself from trying the case. The case of *Suresh Chandra Sinha* v. *Banku Sadukhan* (1) is exactly parallel, the whole of the trial was, therefore, illegal as no superior Court was moved to revive the case. I set aside the conviction and sentence, and order the accused to be acquitted.

The petitioner thereafter moved the High Court and obtained a Rule on the District Magistrate and the accused to set aside the orders of the Magistrate, dated the 10th January and of the Judge on appeal, on the ground mentioned in the judgment of the High Court.

Mr. K. N. Chaudhuri (with him *Babu Dwijendra Nath Mukerjee*), for the petitioner. The order of the 10th was a nullity, and the Magistrate was not debarred from treating it as such and proceeding with the trial when the complainant appeared on the date fixed for the hearing: see *H. C. Proceedings, 17th Aug. 1875* (2). The accused, besides, took no objection on appearance.

Babu Manmatha Nath Mukerjee, for the opposite party. The Court ought not to interfere with the

(1) (1905) 2 C. L. J. 622. (2) (1875) 2 Weir 307.

acquittal, having regard especially to the terms of the Magistrate's judgment of conviction.

SHARFUDDIN AND TEUNON JJ. The petitioner in this case obtained a Rule from this Court calling upon the District Magistrate of Bhagalpur and also on the opposite party to show cause why the order of the Magistrate, dated the 10th January 1914, and the order of the Sessions Judge dated the 31st March 1914, should not be set aside and such other order made as to this Court may seem fit on the ground that the order of the Magistrate, dated the 10th January 1914, was so irregular as to amount to no trial at all.

The facts of the case are these. On the 22nd December 1913, a complaint was made by the petitioner against a certain number of persons. The date for the hearing as fixed by the Magistrate was the 16th January 1914. But it so happened that through some mistake or oversight on the part of the Magistrate's *peshkar* the case was called on for hearing on the 10th of January, *i.e.*, six days before the date actually fixed for hearing. Of course on that date the complainant was absent. The Magistrate thereupon passed an order acquitting the accused under section 247 of the Code of Criminal Procedure. On the 16th of January, the case was again called on, and then the mistake that was made on the 10th January was discovered for the first time. The trying Magistrate ignored the order of acquittal passed on the 10th January, and went on with the case. The case was taken up from time to time from the 16th January to the 9th March, witnesses were examined, arguments on both sides heard. On the 9th of March 1914, the Magistrate convicted the accused and sentenced them each to one month's rigorous imprisonment and to pay a fine of Rs. 20 each. Thereupon, the accused preferred an

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appeal to the Sessions Court. The learned Sessions Judge, on the 31st March, passed the following order. "The learned Sub-Divisional Officer by his order of acquittal, dated the 10th January 1914, debarred himself from trying the accused. The reported case of *Suresh Chandra Sinha* v. *Banku Sadhukhan* (1) is exactly parallel. The whole of the trial was, therefore, illegal, as no superior Court was moved to revive the case. I set aside the conviction and sentence and order that the accused be acquitted. The fine, if paid, will be refunded to appellant."

On the above facts, the first question that arises is whether the order of acquittal passed by the Sub-Divisional Officer, professedly under section 247 of the Criminal Procedure Code, on the 10th January 1914, was a legal order or a mere nullity. If it was a mere nullity then the trying Magistrate could ignore that order, and ignoring that order could go on with the case which was fixed originally for the 16th and which was also called on for hearing on the 16th when the parties were present. As a matter of fact the trying Magistrate ignoring that order went on with the case, recorded evidence, heard the arguments and then convicted the accused on the 9th March. If it was a nullity then the order of the learned Sessions Judge, dated the 31st March 1914, cannot stand, because the learned Sessions Judge seems to be of opinion that, so long as the order of acquittal passed by the Sub-Divisional Magistrate on the 10th January is not set aside, it is a bar against the re-opening of the case by the Sub-Divisional Magistrate.

There is a case reported, *H. C. Proceedings, 17 Aug. 1875* (2), the facts of which are similar to the facts of the present case. The reported case was fixed for hearing on the 17th August on which date both the

(1) (1905) 2 C. L. J. 622. (2) (1875) 2 Weir 307.

parties failed to appear. The Magistrate being at the time on circuit postponed the case on his own motion for the 18th, 19th and 20th August without any intimation being given to the parties. The parties having failed to appear on either of these days the Magistrate on the 20th August dismissed the complaint for default on the part of the complainant. On the 9th December following, the District Magistrate directed the Magistrate who dismissed the complaint to restore the case to the file and dispose of it in due course. The matter went up to the Madras High Court. It appeared to that High Court that the proceedings of the trying Magistrate were so substantially irregular as to amount to no trial at all, and it was held that in this view the dismissal of the complaint could not be held to operate as an acquittal. This is a clear authority on the point that an order passed on a date which was not fixed for the hearing and on which date the complainant was necessarily absent, is no order at all. If it is a nullity, the trying Magistrate had jurisdiction to go on with the case and to come to the finding which he did. The Sessions Judge relies upon the case of *Suresh Chandra Sinha* v. *Banku Sadhukhan*(1). The facts of that case are quite different from the facts of the present case. In this reported case the complainant was absent on the date fixed for the hearing and the Magistrate acquitted the accused under section 247 of the Criminal Procedure Code. He strictly followed the law. In such a case the order cannot be treated as a nullity. This being our view, we are of opinion that the order of the learned Sessions Judge, dated the 31st March 1914, should be set aside, and we set it aside accordingly, and direct that the appeal be re-heard on the merits.

E. H. M. *Rule absolute.*

(1) (1905) 2 C. L. J 622.

APPELLATE CIVIL.

Before D. Chatterjee and Walmsley JJ.

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June 18.

GANESH BHAGAT

v.

SARADA PRASAD MUKERJEE.*

Court-fee—Plaint—Valuation of Suit—Court Fees Act (VII of 1870) s. 7, sub-s. (4) cl (c).

In a suit for a declaration that a decree for over 22,000 was bad and might be set aside, the plaintiffs, who were interested only in three annas share of the property which was valued at Rs 9,000, were required to pay court-fee for the whole of the decretal amount :—

Held, that the plaintiffs must value their suit according to the extent of their claim and the court-fee need therefore be paid only upon that amount.

Phul Kumari v. *Ghanshyam Misra* (1) and *Harihar Prasad Singh* v. *Shyam Lal Singh* (2) referred to.

APPEAL by Ganesh Bhagat, the plaintiff.

This appeal arose out of an order of the Subordinate Judge of Bhagalpore rejecting a plaint as being insufficiently stamped. The suit was for a declaration that a decree obtained by the defendant for over Rs. 22,000 against themselves and their relations was bad so far as they were concerned since they had neither taken the loan nor were in any way benefited by it and were not even represented in the suit and that their share in the family property, which was three annas and was valued at Rs. 9,000, was improperly sold in execution of that decree.

* Appeal from original Decree, No. 430 of 1912, against the decree of D. N. Dey, Subordinate Judge of Bhagalpore, dated Nov. 27, 1912.

(1) (1907) I. L. R. 35 Calc. 202. (2) (1913) I. L. R 40 Calc. 615.

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They paid court-fee upon ten times the Government revenue. They were willing to pay court-fee upon 9,000, the value of three annas share of the property sold under the mortgage decree. The Subordinate Judge, however, held that they were not entitled to maintain the suit upon that court-fee and ordered that they should pay court-fee upon the whole of the decretal amount which was over Rs. 22,000.

Babu Mohini Mohan Chatterjee and *Babu Probodh Chandra Dutt*, for the appellant.

Babu Naresh Chandra Sinha and *Babu Kalidas Sirkar*, for the respondents.

D. CHATTERJEE AND WALMSLEY JJ. This is an appeal against an order of the Subordinate Judge of Bhagalpore rejecting a plaint as being insufficiently stamped. The suit of the plaintiffs was for a declaration that a decree for over Rs. 22,000 obtained by the defendant against themselves and their relations was bad so far as they were concerned as they never took the loan, were not benefited by the loan and were not properly represented in the suit and that their share in the family property which was three annas and valued at Rs. 9,000 had been improperly sold in execution of that decree. They paid court-fee on their plaint upon ten times the Government revenue. They were, however, willing to pay court-fee upon Rs. 9,000 the value of their three annas share of the property sold under the mortgage decree. The learned Subordinate Judge, however, thought that they were not entitled to maintain the suit upon that court-fee and must pay court-fee upon the whole amount of the decree which was over Rs. 22,000.

It has been contended before us that the learned Judge is wrong, and on the ground that the loss to the

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plaintiffs must be the index to the value of the action so far as the plaintiffs are concerned. If the plaintiffs' loss on account of the decree was small they would not be bound to value their suit according to the decree. In support of this contention, the learned vakil for the appellants has relied upon the remarks of the Privy Council in the case of *Phul Kumari* v. *Ghanshyam Misra* (1) where their Lordships are reported to have said: "The value of the action must mean the value to the plaintiff. But the value of the property might quite well be Rs. 1,000, while the execution debt was Rs. 10,000. It is only if the execution debt is less than the value of the property that its amount affects the value of the suit." This case was, no doubt, a case under Section 283 of the Code of Civil Procedure and it was held that it came under sub-section (*l*) of the Art. 17 of Schedule II, of the Court-Fees Act, namely, a suit to alter or set aside a summary decision or order of a Civil Court not established by Letters Patent. In the portion which we have quoted above, their Lordships explain the meaning of the words 'value of the action' as meaning the value to the plaintiff; and to that extent it may be a guide for the decision of this case.

On the other hand, the learned vakil for the respondent has drawn our attention to the case of *Harihar Prasad Singh* v. *Shyam Lal Singh* (2). That was a case to some extent analogous to the present case. In that case, in execution of a decree for Rs. 2,794 a property worth Rs. 7,000 had been sold and their Lordships held that the plaintiff must value his suit according to the value of the decree. The value of the decree in that case was less than the value of the property and the judgment was in accordance with what their Lordships of the Privy Council said

(1) (1907) I. L. R. 35 Calc. 202. (2) (1913) I. L. R. 40 Calc. 615.

in the case of *Phul Kumari* v. *Ghanshyam Misra* (1) namely, "it is only if the execution debt is less than the value of the property that its amount affects the value of the suit." In that case the court-fee was directed to be paid upon the value of the decree which was less than the value of the property which the plaintiff wanted to recover.

In this case, however, the loss that the plaintiffs have suffered is the loss of their property which is valued at Rs. 9,000. The value of the action to them, therefore, is Rs. 9,000, and the prayer in the plaint that the decree may be set aside to the extent of the share of the plaintiffs which has been added to the plaint does not indicate that the plaintiffs were increasing the value of the action so far as they were concerned. Taking their share as three annas, the share of the decree so far as they would be affected would be much less than Rs. 9,000. As the plaintiffs, however, valued their loss at Rs. 9,000, we think that the court-fee must be paid upon that according to section 7, sub-section (*4*) clause (*c*), and that the plaintiffs must value their plaint accordingly.

The order, therefore, requiring the plaintiffs to pay court-fee on Rs. 22,876-7-6 is wrong and must be set aside, and the case sent back to the lower Court to be dealt with in accordance with law. The plaintiffs must have their costs of this appeal.

The plaintiffs will be allowed to pay court-fees within eight weeks from this date.

Let the record be sent down without delay.

S. K. B. *Appeal allowed: case remanded.*

(1) (1907) I. L. R. 35 Calc. 202.

CRIMINAL REVISION.

1914

June 18.

Before Sharfuddin and Teunon JJ.

KANCHAN MALLIK

v.

EMPEROR.*

Appeal—Criminal case—Practice—Duty of Appellate Court in dealing with the evidence on appeal—Proper standpoint—Conviction not to be upheld unless guilt beyond reasonable doubt affirmatively established—Criminal Procedure Code (Act V of 1898) s. 423.

In an appeal from a conviction it is for the Appellate Court, as it is for the first Court, to be satisfied affirmatively that the prosecution case is substantially true, and that the guilt of the appellant has been established beyond all reasonable doubt. To hold that, unless reasonable ground is given to the Appellate Court for differing from the lower Court, the Appellate Court must accept its findings of fact, is to approach the case from a wrong standpoint.

The facts of the case are as follows On the 1st January 1914, a Civil Court peon went with the decree-holders to the petitioners' village to attach certain crops in execution of the decree, whereupon they were alleged to have assembled in an armed body and obstructed the peon, and later on, to have reaped and removed the crops. The petitioners were accordingly put on trial before Babu N. C. Roy Chowdhry, Deputy Magistrate of Khulna, under sections 144 and 186 of the Penal Code, convicted, on the 13th March and sentenced, the first and third, to three months' rigorous imprisonment under each section, concurrently, and a

* Criminal Revision No 808 of 1914 against the order of H. A. Street, Sessions Judge of Khulna, dated March 25, 1914.

fine of Rs. 50 under each, and the second to a fine of Rs. 25, on each of the two charges. They appealed to the Sessions Judge of Khulna who upheld the conviction but reduced the sentences. The material portions of the learned Judge's judgment are as follows :—

"The prosecution have examined nine, and the defence two ; (out of five in all) to prove the rival occurrences. The lower Court with the witnesses before it has believed the former, and unless reasonable ground is given me for differing I must accept that finding of fact. The following criticisms of the prosecution evidence are offered :—

(*i.*) The witnesses are D. H's. tenants.

(*ii.*) The witnesses, except No. 2, and the peon prove only the obstruction and not the subsequent reaping of the paddy that day.

(*iii.*) The police have not been called to corroborate the peon's statement.

(*iv.*) Admittedly over 20 persons were present on the side of the decree-holder, and accused about 12 in number as alleged, could not have driven them away.

(*v.*) Harmuz, accused, is not named in the peon's report of January 2nd, he is only 13 or 14 years old and could not have been there.

(*vi.*) On 23rd December last the brother filed a claim before the Munsif and had nothing to gain by this action . . . . .

None of these contentions leads me to discredit the prosecution story."

[The Court then dealt with the above points and continued.]

"It is to be noted that the allegation that the peon cut the paddy was never suggested in cross examination nor made by the accused when examined on 5th Feby. It first appears in an affidavit on the 7th before the Civil Court, and is clearly an after thought. I find, therefore, that accused with others obstructed the peon on the 1st January last and formed an unlawful assembly with the common object charged."

[The Court then upheld the convictions but reduced the sentences.]

The petitioners thereupon moved the High Court and obtained the present Rule.

Maulvi A. K. Fazlul Huq, for the petitioners. The Appellate Court has dealt with the case from a wrong point of view. The learned Judge should have

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considered whether the evidence established the guilt of the accused beyond reasonable doubt.

SHARFUDDIN AND TEUNON JJ. In this case the petitioners were convicted under sections 186 and 144 of the Indian Penal Code, and sentenced, petitioners Nos. 1 and 3, to three months' rigorous imprisonment and to pay a fine of Rs. 50 under each section, and petitioner No. 2, Harmuz Ali, who is said to be a boy of 13 or 14 years of age, to pay a fine of Rs. 25 under each section. The sentences of imprisonment on the petitioners Nos. 1 and 3 were to run concurrently. They obtained a Rule from this Court calling upon the District Magistrate of Khulna to show cause why the order complained of should not be set aside and such other or further order made as to this Court might seem fit and proper on the ground that, at the hearing of the appeal by the learned Sessions Judge, the learned Sessions Judge approached the consideration of the case from a wrong standpoint. On turning to his judgment we find that he opens his judgment as follows: "The prosecution has examined nine witnesses and the defence two (out of five in all) to prove the rival occurrences. The lower Court with the witnesses before it has believed the former, and unless reasonable ground is given me for differing I must accept that finding of fact." That is to say he has practically called upon the appellants before him to establish to his satisfaction that the first Court has come to a wrong finding. This is not the standpoint from which an appeal in a criminal case is to be approached. In an appeal from a conviction and sentence, it is for the Appellate Court, as for the first Court, to be satisfied affirmatively that the prosecution case is substantially true, and that the guilt of the appellants has been established beyond all reasonable doubt. We are.

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therefore, of opinion that the order of the Appellate Court must be set aside, and we accordingly set it aside and direct that the appeal be re-heard. At the re-hearing of the appeal, it will be for the consideration of the Sessions Judge whether the cumulative sentences in the case of Harmuz Ali ought or ought not to be affirmed. In these terms we make the Rule absolute.

E. H. M. *Rule absolute.*

CIVIL RULE.

Before Holmwood and Chapman JJ.

1914

June 19.

ABDUL QUADIR

v.

SHAHBAZPUR CO-OPERATIVE BANK.*

Co-operative Society—Charge—Priority—Co-operative Societies Act (II of 1912) ss. 19, 20—Attachment—Civil Procedure Code (Act V of 1908) s. 73.

Under s. 73 of the Code of Civil Procedure the claim of a co-operative society cannot be enforced unless they have a decree or charge under s. 20 of the Co-operative Societies Act (II of 1912), though under s. 19 of that Act the society might have raised an objection to the attachment by reason of other sections of the Code of Civil Procedure.

RULE obtained by Abdul Quadir, the decree-holder, objector, against the Co-operative Bank of Shahbazpur and others, applicants under s. 19 of Act II of 1908 read with s. 73 of Act V of 1908.

The facts are briefly as follows. Abdul Quadir, the decree-holder, had attached certain property of his judgment-debtor one Samiruddin against whom he had obtained a decree for money, in the Court of the

* Civil Rule No. 587 of 1914 made against the order of K. B. Sen, Munsif of Nabinagar, dated Feb. 26, 1914.

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Munsif of Nabinagar. Thereupon the applicants, who appeared for the Co-operative Bank of Shahbazpur, filed an application under s. 73 and Order XXI, rule 66 of the Code of Civil Procedure for enforcing a charge under s. 19 of the Co-operative Societies Act (II of 1912). The applicants alleged that the judgment-debtor had borrowed money from the Bank in question for the purchase of cattle and seed grains. The books of the Bank showed that the judgment-debtor was a member and he had borrowed money for his agricultural purposes. On the other hand, the decree-holder alleged that the judgment-debtor had the cattle in his possession for a very long time. No evidence was produced to show that the alleged Co-operative Bank had been registered under the provisions of Act II of 1912 and there was, further, no evidence that the said Bank had any decree against the judgment-debtor.

In spite of the absence of such evidence and without any findings to that effect, the learned Munsif of Nabinagar passed an order on the 26th February directing that the money fetched by the sale of certain specified lots of the attached properties should go first to liquidate the debts due to the said Bank and that the decree-holder should get only the surplus.

The decree-holder thereupon moved the High Court against that order and obtained this Rule.

Moulvi A. K. Fazlul Huq, for the petitioner. I submit that the order of the learned Munsif under s. 73 of the Civil Procedure Code is without any jurisdiction and further illegal. As this Bank was not registered and had no decree against the judgment-debtor, it could not claim rateable distribution. This application could not lie as the section referred only to decree-holders. Further, this Bank had no charge

over the property as the charge contemplated by s. 20 of Act II of 1912 is a charge only upon the share or dividend of a member of the Co-operative Society. Nor does s. 19 of that Act create any charge. Hence I submit that the order of the learned Munsif must be set aside.

Mr. Rasul (with him *Babu Upendra Kumar Roy*), for the opposite party, showed cause. I submit that though the learned Munsif states that this is an application under s. 73 of the Code of Civil Procedure he does not really treat it as such, but as an application under Act II of 1912. Under s. 19 of this Act the society is entitled to realise its outstandings and claims as this section creates an equitable charge on the two classes of property specified in clauses (*a*) and (*b*) thereof, the special privilege conferred thereby not affecting any other properties of the judgment-debtor. So to enforce its prior claim the Bank need not obtain a decree as delay would defeat the very object of the Co-operative Societies Act, viz., the speedy realization of money advanced to promote thrift and self-help among agriculturists.

HOLMWOOD AND CHAPMAN JJ. This is a Rule which was obtained by the decree-holder in an application under Section 73 of the Code of Civil Procedure made by a Co-operative Society for enforcing a charge under section 19 of Act II of 1912. The application was undoubtedly made under section 73, and under that section we are of opinion that the Co-operative Society could have no priority to other creditors, unless there are one or more persons than one who have made applications to the Court for the execution of decrees for payment of money passed against the same judgment-debtors. To hold otherwise would be to give these Co-operative Societies a

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power which even Government in its much discussed certificate procedure does not claim. They would claim in other words to recover money without either decree or certificate or any legal title to enforce their debt. Admittedly, there is no charge in this case within the meaning of section 20 of the Co-operative Societies Act, so that the proviso to section 73 does not come in. It is possible that under section 19, the Society might have raised an objection to the attachment by reason of other sections of the Code of Civil Procedure; but with that we are not concerned. It appears to us perfectly clear that under section 73 the claim of a Co-operative Society cannot be enforced unless they have a decree or a charge under section 20.

The Rule, therefore, must be made absolute and the order of the lower Court set aside without prejudice to any action which the Society may seem fit to take, if so advised.

The petitioner is entitled to his costs in this Rule.

G. S. *Rule absolute.*

CRIMINAL REVISION.

Before Sharfuddin and Teunon JJ.

SADANANDA MANDAL

v.

KRISHNA MANDAL.*

1914

June 24.

Dispute concerning land—Evidence not recorded according to law, but memorandum taken down and signed by the Magistrate personally—Legality of final order—Criminal Procedure Code (Act V of 1898) ss. 145, 356 (1) and (3).

The provisions of sub-section (*1*) of s. 356 are mandatory. Sub-section (*3*) applies only where evidence has been recorded in accordance with sub-section (*1*) but not personally by the Magistrate.

Where the Magistrate did not take down the evidence himself nor was it taken down in his presence and hearing and under his personal direction and superintendence nor signed by him, but he made a memorandum thereof and signed the same :—

Held, that the provisions of s. 356 had not been complied with, and that the order declaring the opposite party to be in possession was bad in law

UPON the receipt of a police report that there was a likelihood of a breach of the peace between the petitioner and Krishna Mandal, the opposite party, regarding the possession of certain land in village Moghi, in the destrict of Jessore, the Sub-divisional Officer of Magura drew up a proceeding under s. 145 of the Criminal Procedure Code and called upon the parties to file written statements of their claims as respects the fact of actual possession. On the date fixed for the hearing of the case, the Magistrate examined the witnesses of both parties, but did not record their

* Criminal Revision No. 807 of 1914 against the order of S. N. Das Subdivisional Officer, Magura, dated March 18, 1914.

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evidence himself nor was it recorded in his presence and hearing in accordance with the provisions of sub-section (*1*) of s. 356. He, however, made a memorandum of the substance of the evidence and signed the same. By his order, dated the 18th March 1914, he declared the opposite party to be in possession of the disputed land until evicted by the order of a competent Civil Court. The petitioner thereupon moved the High Court and obtained the present Rule on the grounds stated in the judgment below.

Babu Hari Bhushan Mukerjee (with him *Babu Satish Chandra Ghatak*), for the petitioner. The Magistrate has not complied with the provisons of s. 356 of the Code which requires the evidence to be taken down in full. He cannot decide a case under s. 145 only on a memorandum of the evidence.

Babu Narendra Kumar Bose, for the opposite party. The Magistrate is competent to act on a memorandum of the evidence. Besides, the irregularity, if any, does not go to the root of the case. The proceedings cannot be set aside on such a ground.

SHARFUDDIN AND TEUNON JJ. This Rule, issued at the instance of the first party to proceedings under section 145 of the Criminal Procedure Code, called upon the District Magistrate and the opposite party to show cause why the final order made in these proceedings should not be set aside on two grounds, namely, *first*, that the evidence had not been recorded in the manner provided by section 356 of the Criminal Procedure Code; and, *secondly*, on the ground that the Magistrate did not receive the oral and documentary evidence tendered by the petitioner. The District Magistrate has submitted an explanation. From this explanation we find that in fact the trying Magistrate

did receive all the evidence, oral or documentary, that was offered. With regard to the first ground what the Magistrate says is that the Subdivisional Magistrate, that is to say, the trying Magistrate, made a memorandum of the evidence in the manner required by sub-section (*3*) to section 356 of the Code of Criminal Procedure, and that the making of that memorandum should be regarded as a sufficient compliance with the requ rements of the law. We are unable to accept this contention. The provisions of sub-section (*3*), section 356 of the Code of Criminal Procedure, apply only to cases in which the evidence recorded under sub-section (*1*) is not recorded in the Magistrate's own hand. The provisions of the first sub-section are imperative, and we are unable to condone the non-compliance therewith. We, therefore, make this Rule absolute and set aside the order complained of.

E. H. M. *Rule absolute.*

PRIVY COUNCIL.

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March 16, 18, 27, 30; *June* 29.

RAMCHANDRA MARTAND WAIKAR
v.
VINAYEK VENKATESH KOTHEKAR.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF THE CENTRAL PROVINCES.]

Hindu Law—Inheritance—Right of bandhus to inherit—Bhinnagotra sapindas—Paternal grandfather's son's son's daughter's sons—Limitation of sapinda relationship—Same limitation namely 7 degrees on father's side and 5 degrees on mother's side in respect of marriage, affinity, impurity and exequial rites and in cases of inheritance—Mitakshara, Ch. II, ss. 5 and 6.

THE Hindu law contains its own principles of exposition, and questions arising under it cannot be determined on abstract reasoning, or on analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own law-givers and recognised expounders.

The word "*bandhu*" has in the system of the Mitakshara a distinctive and technical meaning, in other words it signifies a *bhinna-gotra sapinda*.

The appellants as being the paternal grandfather's son's son's daughter's daughter's sons of a deceased Hindu, claimed to succeed to his property as his next-of-kin or *bandhus* under the Mitakshara law. The respondents contended that the appellants had no heritable right in the property as they did not come within the category of *bandhus* entitled to succeed.

Held, (*a*) that the *sapinda* relationship on which the heritable right of collaterals is founded ceases in the case of the *bhinna-gotra sapinda* with the fifth degree from the common ancestor; and (*b*) that in order to entitle a man to succeed to the inheritance of another, he must be so related to the latter that they are *sapindas* of each other. The appellants, therefore, being sixth in descent from the common ancestor, and there being no *sapinda* relationship between them and the propositus, they came within neither (*a*) nor (*b*) and were not entitled to inherit.

* *Present*: LORD MOULTON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE AND MR. AMEER ALI.

The decision in the case of *Greedharee Lall Roy* v. *Government of Bengal* (1) does not warrant the contention that the three classes of *bandhus*, namely *atma-bandhus*, *pitri-bandhus* and *matri-bandhus*, into which Vijnaneswara divides the *bandhus* in the Mitakshara, can be added to or extended.

The limitation of *sapinda* relationship laid down in the Mitakshara (Achara Kanda) *i.e.*, that it ceases after the 7th ancestor on the father's side and the 5th ancestor on the mother's side, is not confined to prohibition in respect of marriage, impurity, and exequial rites only, but applies also to inheritance.

Lallubhai v. *Mankuvarbai* (2) per Westropp C. J., *Umaid Bahadur* v. *Udoi Chand* (3) and *Babu Lal* v. *Nanku Ram* (4) referred to.

The value of the statement by Shastri Golap Chandra Sarkar in his work on Hindu law that "the word '*bandhu*' in the Mitakshara means and includes all cognate relations without any restriction, or at any rate all cognates within 7 degrees on both the father's as well as the mother's side," is considerably discounted by his desire, in order to prevent the deceased's property becoming, so to speak, derelict, and thus escheating to the Crown to bring in the caste people also as *bandhus* ; and his employing the English equivalent of relation does not seem to be supported by the definition of *sapinda* relationship in the Mitakshara itself.

The argument that the application of the *sapinda* relation in the case of *bandhus* should be extended beyond the 5th degree on the ground that it is not likely that Vijnaneswara would give a right of inheritance to a spiritual preceptor or *guru* before kinsmen, however remotely connected, ignores the peculiar and intimate relationship which exists in the Hindu system between the pupil and the *guru* who has to initiate him into the mysteries of the Vedic laws and rites, and under whose roof he has to pass so many years of his life, in which circumstances the mystical relationship between a spiritual preceptor and his pupil might well be regarded as creating a far closer tie than remote relationship of blood.

APPEAL from a judgment and decree (23rd March 1910) of the Court of the Judicial Commissioner, Central Provinces, which affirmed a judgment and decree (26th February 1907) of the Court of the District Judge, Balaghat.

The plaintiffs were the appellants to His Majesty in Council.

(1) (1868) 12 Moo. I. A. 448.
(2) (1876) I. L. R. 2 Bom. 388, 426.
(3) (1880) I. L. R. 6 Calc. 119.
(4) (1894) I. L. R. 22 Calc. 339.

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RAMCHANDRA MARTAND WAIKAR v. VINAYEK VENKATESH KOTHEKAR.

The suit out of which this appeal arose was brought to recover possession of certain villages to which the appellants claimed to be entitled as the reversionary heirs of one Laxman Rao, the last *malaholder* thereof; and the only question for determination was whether their relationship was too remote to enable them to inherit under the Mitakskara law which both Courts in India had held, in accordance with the appellants' contention, governed the case.

The facts, so far as they are material, and the pedigree of the family, which was not disputed, are set out in the judgment of their Lordships of the Judicial Committee. From the pedigree it will be seen that the appellants claim through their mother, Rangubai, and are sixth in descent from the common ancestor; and the Court of the Judicial Commissioner (Mr. H. V. Drake-Brockman) held, affirming the decision of the District Judge, that they were outside the limits of *bandhu* relationship recognised by the Hindu law, and consequently had no claim to the properties in suit.

On this appeal,

De Gruyther, K. C., and *J. M. Parikh*, for the appellants, contended that under the Mitakshara law the *sapinda* relationship through a mother was not limited to 5 degrees, but extended to 7 degrees, and therefore the appellants were heritable *bandhus* of Laxman Rao: and that even if the limit of *sapinda* relationship was 5 degrees, as held by the Courts in India, the appellants were entitled to succeed as *matri-bandhus*, as their mother being within 5 degrees as prescribed in the Achara Kanda of the Mitakshara for the purpose of marriage was a *bandhu* of Laxman Rao. The appellants were entitled to succeed as being the nearest *sapindas* of Laxman Rao: see Manu

Chapter IX, Verse 187 (Sir W. Jone's translation); and the Vyavastha Chandrika (Ed., 1878) Vol. I, page 189. Under the Law of the Dayabhaga the right to inherit depends on religious merit and the inheritance goes to the person whose duty it is to perform the Shradh of the deceased, and offer funeral oblations: Mayne's Hindu Law, 7th Ed., pages 7, 678 to 681, 689 to 692, and 697; and Mitakshara, Chapter II, section 1 paragraphs 5, 6, and 39. But under the Mitakshara Law sapinda relationship is based on consanguinity and not on religious merit: Mitakshara (Achara Kanda), Chap. III; Shastri's Hindu Law, 4th Ed. pages 52, to 58; Sarvadhikari's Hindu Law of Inheritance, Ed. 1882, page 600; Banerjee's Hindu Law of Marriage and Stridhan, Ed. 1879, page 60; West and Bühler's Hindu Law, Vol. I, page 120; and *Umaid Bahadur* v. *Udoi Chand* (1). And the rule of propinquity in blood relationship on which under the Mitskshara law the right of inheritance depends, extends to all relations of the deceased without any exception: Mitaksnara, Chap. I, section 1, paragraphs 1, 2 and 3, and Chap. II, section 3, paragraphs 3 and 4. The order of succession on failure of a son is given in Mitakshara, Chap. II, section 1, paragraph 2. After the brothers' sons come, the *gotrajas* (gentiles), *bandhus* (cognates), a preceptor, a pupil, and a fellow-student: Mitakshara, Chap. II, section 1, paragraph 3. For the *gotrajas*, see Mitakshara, Chap. II, section 5, paragraph 1; and for the order of priority among *sapindas*, see Chap. II, section 5 and Chap. III, sections 4 and 5. On failure of *sapindas*, the *samanodakas* succeed: Chap. II, sections 5 and 6. There is no limit to the *samanodakas*: every *gotroja* in fact has the right of succession. The word "*sapinda*" is used in Chap. II, section 5, and Chap. III, sections 5 and 6 in a specific sense, and not

(1) (1880) I. L. R., 6 Calc. 119, 124.

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in the generic sense of a blood-relation. Unless it is so used a *samanodaka* would not be a blood-relation; but as all *gotrajas* (including *samanodakas*) are blood-relations it is clear that "*sapinda*" (which is taken from Manu, Chap. V, verse 60 (the Chapter on "Purity"), is not used in the portions of the Mitakshara mentioned in the same sense in which it is used in the Achara Kanda, that is, as meaning a blood-relation. *Bandhus* are blood-relations through a female, and include the special class indicated as *bhinna-gotra sapindas* who do not, however, exhaust the blood-relations of a different *gotra*. Viramitrodaya, pages 199, 200. Chap. II, section 5 of the Mitakshara deals with *gotrajas* only; and relations of a different *gotra* (*bhinna gotrajas*) who are related through at least one female, are dealt with in the following section. The *bandhus* are heirs on failure of *gotrajas*: Mitakshara, Chap. II, section 6, paragraph 1, where the list of *bandhus* is given by way of illustration but is not exhaustive; so that persons though not expressly named, as for instance maternal uncles, are heirs: see *Giridhari Lal Roy* v. *Government of Bengal* (1) and Viramitrodaya, page 200. Mitakshara, Chap. II, section 6, paragraph 2, deals with the order in which *bandhus* succeed according to the degree of propinquity. The appellants are admittedly *bandhus* of Laxman Rao, and, it was submitted, they were therefore his heirs. If there be no *bandhus*, a preceptor succeeds, and after him the pupil: Mitakshara, Chap. II, section 7, paragraph 1, the principle of the plan of the author of the Mitakshara being to exhaust all the blood relations before allowing strangers to inherit. If the appellants are held not to be heirs there would arise a possibility of the property of Laxman

(1) (1868) 12 Moo. I. A. 448, 465.

Rao escheating to the Crown, which ought not to occur before all blood-relations have been exhausted.

The view that blood-relations must be exhausted before strangers can come in is adopted in the Viramitrodaya which is an authority in the Benares School of Hindu Law to which the parties belong. Colebrooke's translation of section 5, Chap. II of the Mitakshara is erroneous: see *Lallubhai Bapubhai* v. *Mankuvarbai* (1) and *Lallubhai Bapubhai* v. *Cassibai* (2). "Sapinda" is also used in a restricted sense for three other purposes, (*a*) prohibited degrees of marriage, (*b*) impurity on birth or death, and (*c*) Shradh, or funeral oblations; but all these are exceptional uses of the word, and do not control its general use as a "blood-relation." Manu, Chap. III, verse 5; and Chap. V, verses 57 to 61; and Yajnavalkya, Chap. I, 52, 53, and Chap. II, 136, 137 which show that *bandhus* generally, *i.e.*, person not *sapindas* in the special sense, do inherit: Banerjee's Hindu Law of Marriage and Stridhan (Ed. 1878), pages 62 and 63; Mandlik, pages 345, 391; Vyavastha Chandrika, page 193; and the Viramitrodaya page 156. So long as there is a blood-relation of the family to take it, the inheritance should not go to a stranger: Mandlik, page 358, where there is a passage from Vasistha cited.

The view of the Courts in India in *Umaid Bahadur* v. *Udoi Chand* (3) and *Babu Lal* v. *Nanku Ram* (4), that the limitation of the *sapinda* relationship for the purpose of marriage is applicable for the purpose of inheritance is an *obiter dictum*; it is also, it is submitted, erroneous. Different authorities lay down different degrees of prohibition, and special degrees are given according to local usage and caste custom,

(1) (1876) I. L. R. 2 Bom. 388.
(2) (1880) I. L. R. 5 Bom. 110: L. R. 7 I. A. 212.
(3) (1880) I. L. R. 6 Calc. 119.
(4) (1894) I. L. R. 22 Calc. 339.

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the result being a variable rule, which is not applicable for purposes of inheritance: see Mayne's Hindu Law, 7th Ed., page 103; Mandlik, pages 410, 411, 413, 414, 416 and 425; and Shastri's Hindu Law, pages 70, 93 and 94. For inheritance a definite and invariable rule is necessary. The rule for marriage was designed to fix relationship between a man and a woman. But only women specially named can inherit; so that for purposes of inheritance a rule is necessary to fix the relationship of one man to another. In marriage too the rule only applies in the case of a girl of a different *gotra* (*bhinna gotra*); there is, therefore, no limitation in the case of *gotraja sapindas*, but only in the case of *bhinna-gotraja sapindas*. The rule is arbitrary and leads to absurdities. For instance, Laxman Rao could not have married the appellants' mother, and he could therefore have been the appellants' heir as being their mothers *bandhu*; yet according to the Courts in India the appellants cannot be Laxman Rao's heirs. Also, supposing the appellants died, their sons would be Laxman Rao's heirs as they would be claiming through their father, so that the appellants' sons would be Laxman Rao's heirs but the appellants themselves are not. The effect of the rule as to marriages is different according to the mode of reckoning the degrees of limitation: if reckoned, as some authorities do, inclusively of the bride (see Mayne's Hindu Law, 7th Ed., page 104) that mode of calculation applied to inheritance would bring the appellants within the prohibited degrees. The appellants who claim through their mother should be, it is submitted, held to be Laxman Rao's heirs.

It has been decided in the cases *Umaid Bahadur* v. *Udoi Chand* (1) and *Babu Lal* v. *Nanku Ram* (2),

(1) (1880) I. L. R. 6 Calc. 119. (2) (1894) I. L. R. 22 Calc. 339.

that there must be mutuality of *sapindaship* between the deceased and the person who claims to inherit his property; and in order to determine if such mutuality exists "it is necessary to see whether the two persons are related as *sapindas* to each other either directly or through their mothers or fathers." The only authority for that doctrine is Sarvadhikari's Hindu Law of Inheritance, page 569, where Visveswara Bhatt, and Ballam Bhatt are cited. But commentators of the Mitakshara cannot override its authority, and their works are not authorities in the Benares School of Law to which the parties belong: see West and Bühler, page 17; Morley's Digest, Vol. I, Introduction, pages cci, ccv, and ccxxi; and Vyavastha Chandrika, Preface, pages 17 and 18. The explanation of the doctrine given at pages 688, 689 and 696 of Sarvadhikari is not clear, and the doctrine seems to be taken from the Bengal School where the right of succession depends on the duty of offering funeral oblations: Mayne's Hindu Law. 7th Ed., page 680; but it is not based on religious efficacy, for in *Babu Lal* v. *Nanku Ram*(1), although two females intervened, it was held there was mutuality between the propositus and the claimant. All *sapindaship* must be mutual, if *sapindaship* is blood-relationship: see Ghose's Hindu Law, 2nd Ed., pages 151 to 153; and Shastri's Hindu Law, pages 74 to 76 and 291, 294, and 296. But in any case, it was submitted, that the appellants come within the rule for their mother and Laxman Rao are sapindas of each other, and the appellants through their mother are sapindas of Laxman Rao.

If, however, the intention of the author of the Mitakshara was to limit *bandhu* relationship, it appears that there are laid down two limitations of *bhinna-gotra sapindaship* which is limited to 7 degrees

(1) (1894) I. L. R. 22 Calc. 339.

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where the first parent happens to be the father, and 5 degrees if the first parent is the mother; which creates the anomaly that the appellants are not the heirs of the propositus, but the appellants' sons are. And, in the chapter on Inheritance, the author of the Mitakshara puts a limitation of 7 degrees on the *sapinda* relationship in the same *gotra*, but lays down no limitation on that relationship in a different *gotra*. If, then, there is to be any limitation on the latter, it should be the one given in the chapter on Inheritance and it should be 7 and not 5 degrees: *Umroot* v. *Kalyandas* (1), and West and Bühler, pages, 489 and 543. It is submitted that would remove anomalies and give uniformity. Reference was also made to *Parot Bapalal Sevakram* v. *Mehta Harilal Surajram* (2), *Venkatagiri* v. *Chandru* (3), and *Rangu Bai* v. *Ganpat Rao Gopal Ghatale* (4).

Ross, *K. C.*, and *G. R. Lowndes*, for the respondents, pointed out that the case now made for the appellants was not that which was put forward in the Courts in India and in the appellants' printed case in this appeal, which was that the limit of *bandhu* relationship through a mother was 7 degrees. Now the contention was there is no limit; a case which had never been put forward before, and on which there was no authority. In India the discussion had always been whether claimants came within the limits of *bandhu* relationship: see *Manik Chand Golecha* v. *Jagat Settani* (5), and the other cases there cited. No commentator had ever suggested such a view except G. C. Sarcar. The basis of the contention, it was submitted, was a fallacy. The Mitakshara, (Achara Kanda) says that "all *sapindas*

(1) (1820) 1 Borr. 323.
(2) (1894) I. L. R. 19 Bom. 631.
(3) (1899) I. L. R. 23 Mad. 123.
(4) (1901) 14 C. P. Rep. 185.
(5) (1889) I. L. R. 17 Calc. 518.

are blood connections," that *sapindaship* means connection by blood and not funeral oblations. Counsel for the appellants would read this as equivalent to "all blood connections are *sapindas*"; but that cannot be admitted. In Chap. II of the Mitakshara, "On Inheritance," which is the one we are concerned with, the term "*sapinda*" is not used in the wide sense contended for by the appellants. In sections 5 and 6 a clear distinction is made between *sapindas* and *samanodakas*; the *sapindas* take first, and on failure of them *samanodakas* take, which clearly showed that *sapindas* were a limited class. The term "*sapinda*" both in section 5 and section 6, is limited to the nearest male *gotrajas*. Colebrooke's translation omits from Section 5 the word "*saptamat*" at the end; and the last sentence should run—"In this manner must be understood the succession of *gotraia sapindas* up to the 7 degree." This omission is clearly stated in Dr. Jolly's lectures, pp. 209-210, In section 6 the limitation of *sapindas* to the 7th person is repeated, and the authority of Vrihat Manu, in a work which has not survived, is quoted for it. If in speaking of *gotrajas* the term *sapinda* is limited to 7 degrees, the same word must be equally limited in section 5, Verse 3, where it is used in the explanation of the term *bandhus*, as being *bhinna-gotraja sapindas*. The limitation of the term *gotraja-sapindas* to the seven persons is meant to embrace those who offer both the whole *pind*, and the *lepa* or fragments. In older works, the two classes were distinguished as *sapindas* and *sakulyas*; this distinction is not kept up in the Mitakshara where the term *sapinda* is used to denote both classes, but the distinction between them and *samanodakas* is clearly maintained.

When we come to *bandhus* we find the right to inherit is confined to *bhinna-gotraja sapindas* there

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being no recognition as heirs of any *bhinna-gotraja samanodakas*, no such class being known to Hindu writers. This showed that the argument for the appellant that there is no limit to the class of *bandhus*, but that the entire definition of *bandhus* as being *sapindas* is sufficient to let in blood connections however remote is not the case on the wording of sections 5 and 6 of Chap. II of the Mitakshara which deals with *sapindas* as being a definitely limited class.

Then comes the case of the appellants in the Indian Courts, namely, that all *bandhus* within 7 degrees are entitled to inherit, there being no distinction as to inheritance between *bandhus* claiming through the mother and those claiming through the father. The respondents contend in the case of *bandhus* claiming through the mother (as the appellants do) that the limitation is 5 and not 7 degrees. Argument on this is mostly based on the untranslated first part of the Mitakshara which deals with ceremonial, usually known as the Achara Kanda. There is nothing in Chap. II "On inheritance," to show that the right to inherit is based on blood connection at all. The Achara Kanda says that *sapinda* relationship is based on blood connection only, and that this rule is to apply throughout the Mitakshara. It is now settled law that the meaning of *sapinda* relationship is to be so construed in matters of inheritance under the Mitakshara, and that the question is governed by this paragraph in the Achara Kanda. The same passage in the Achara Kanda (which deals primarily with the question of prohibited degrees of marriage) lays down that the *sapinda* relationship for that purpose ceases when traced through the father after 7 degrees, and through the mother after 5 degrees, and the respondents contend that that limitation equally applies in

cases of inheritance. It may have been an arbitrary limitation, but it has come down from very ancient times and was taken as a good working rule: see Manu, Chap. III, verse 5; Gautama, Chap. IV, verses 2—5; Apastamba, Chap. II, verses 11, 15, 16; Vasistha, Chap. VIII, verses 1, 2. And when blood connection (which had always been the ground of the prohibited degrees for marriage), was taken to be also the ground for the right of inheritance, it was natural to take the same limitation as part of the new doctrines; and so we find that modern authoritative commentators have assumed that the limitation of 5 degrees through the mother applied to *bandhu* inheritance: see Mayne's Hindu law (7th Ed.), pages 690-692; 786-787; West and Bühler (3rd Ed.) 121, 488, 489; Dr. Jolly's Tagore Lectures, pages 213, 214; *Lallubhai* v. *Mankuvarbai* (1), *Umaid Bahadur* v. *Udoi Chand* (2), *Babu Lal* v. *Nanku Ram* (3), *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (4); and the Dattaka Mimansa, section 6, verse 10, dealing with the question of the succession of adopted sons. Against this there is only the opinion of G. C. Sarkar who is alive and might have been called as an expert, as he was in a case recently heard by this Board. The reason for some limitation for *sapinda* relationship in the matter of marriage is said in the Achara Kanda to be that without it all the world would be connected, and there would be no possibility of marriage. The same reason would apply to inheritance, for all the world would be *bandhus* of a deceased person, and the provision for inheritance by fellow-pupils, teachers, Brahmins and the Crown, would be absurd. It is suggested that the adoption of this rule in matters

(1) (1876) I. L. R. 2 Bom. 388, 426. (3) (1894) I. L. R. 22 Calc. 339, 345.
(2) (1880) I. L. R. 6 Calc. 119, 124. (4) (1870) 13 Moo., I. A. 373, 380.

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of inheritance would lead to an absurdity, as the sons of the appellants (claiming through their father and so having 7 degrees) would clearly be *bandhus;* but there is no doubt the rule did apply to marriages, where equally absurd results would be produced. It is also said that limitations in the case of marriage have varied, so that the rule is not really definite. But the rule the Mitakshara would naturally adopt, is obviously the one stated by its author (namely 7 and 5 degrees) in the Achara Kanda. The variations are set out in Mayne's Hindu law (7th Ed.), page 103.

Manu and Apastamba are the only writers who are supposed to adopt a different limit in the case of relationship through a mother. The difference ascribed to Manu is due to a gloss of Kulluka: see Mandlik, page 410, note (line 33); and the text of Apastamba was very fragmentary and uncertain. The adoption of the rule of 7 and 5 degrees may have been only a blind following of the rule laid down for marriage—adopted as part of the distinction of *sapindaship* put forward by the Mitakshara. But it is probable there was a definite reason for it.

In and prior to Manu, *bandhus* were not recognised as heirs at all: see for authorities prior to Manu Vol. 2 "Sacred Books of the East," pages 132, 133 and 202, verse 21; Apastamba, Chap. XIV, sections 1-5; Gautama, Chap. XXVIII, section 21; Vasistha, Chap. XVII, sections 79 and 81; and Manu, Chap. IX, sections 185—189. So that up to the era of Manu, the only persons who would inherit were *sapindas* and *sakulyas*, and possibly *samanodakas;* but in no case were persons claiming through a female recognised. The term *bandhu* is used in some of the more ancient treatises, but merely to denote *gotraja* relations, and not in the technical sense in which it is used in the Mitakshara.

Parallel with this confining of inheritance to members of the gotra we find that they only could perform the necessary funeral ceremonies. The *parvana sraddha* could only be performed by *sapindas* and *sakulyas*. *Samanodakas* (as their name implied) only made general offerings of water. But no one through a female could perform any of the *sraddha* ceremonies: see Manu, Chap. III, verses 215, 216. It may be doubtful whether inheritance depended upon the right to perform *sraddha*, but it is certain the two were intimately connected. Yajnavalkya first introduced *bandhus* as heirs, and he also first mentioned the offering of a cake to maternal ancestors: see Yajanvalkya, verse 242; Mandlik's translation, page 190. By Yajnavalkya's time (500 years after Manu) it had become necessary to offer the *pinda* to maternal ancestors, and also to allow those who could offer it to inherit, and this let *bandhus* in. The only cake offered to maternal ancestors was offered to three ascendants of the mother. No *lepa* was offered to higher ascendants, and no water-offerings (corresponding to those of the *samanodakas*), so that the right of inheritance corresponding to the offering made would be confined to 5 degrees counting the person offering; and this is the exact limit of inheritance which the respondents say is allowed to persons claiming relationship through the mother. This may be only a coincidence, but it appears to afford a reasonable explanation why *sapinda*-relationship through the father was 7 degrees, and through the mother only 5 degrees.

Although, when the Mitakshara was written, the right to inherit may have come to depend on blood connection, and not on the right to offer funeral oblations, the latter had still a great influence on the right of inheritance, and the two went together.

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This was shown by the retention of the terms "*sapinda*," and "*samanodaka*," which clearly had their origin in the two kinds of offerings [for the meaning of *sapinda*, see Mayne's Hindu Law, (7th Ed.), page 691 note (*b*)]. It would have been sufficient to put both *sapindas* and *samanodakas* into one class, namely, *gotrajas*. Unless on the ground of religious efficacy why should all the *samanodakas*, however remote, be preferred to near *bandhus* and all females except those expressly named be excluded altogether? See Mitakshara, Chap. II, section 2, verse 6. "The daughter's son is to give the funeral oblation and possess the inheritance." The close connexion of inheritance and funeral rites has also been fully recognised by the Courts: see *Soorendranath Roy* v. *Heeramonee Barmanea* (1), *Amrita Kumari Debi* v. *Lakhinarain Chuckerbutty* (2), and *Lallubhai* v. *Mankuverbai* (3). See also the Viramitrodaya [for the high authority of which see *Giridharee Lall Roy* v. *Bengal Government* (4)] sections 157, 158, though that was written to refute the doctrines of the Dayabhaga which made inheritance depend solely on religious efficacy: see preface to Sarkar's Translation, page x.

The religious efficacy allowed by Yajnavalkya and the Mitakshara to *bandhu* relations is, it was submitted, a reasonable explanation of the limit of 5 degrees to *bandhus ex parte materna*, that being also the limit of their offerings: but besides that the text of the Mitakshara itself which deals with *bandhus*, namely Chap. II, section 6, verse 1, contained its own limitation.

The three classes of *bandhus* recognised are *atma-bandhus*, *pitri-bandhus*, and *matri-bandhus*, and they

(1) (1868) 12 Moo. I. A. 81, 96.
(2) (1868) 12 B. L. R. F. B. 28, 39.
(3) (1876) I. L.R. 2 Bom. 388, 427.
(4) (1868) 12 Moo. I. A. 448, 466.

were mutually exclusive. It has been held that the members of each class mentioned in the text are only illustrative and not exhaustive: but it has never been suggested, much less held, that the classes themselves are not exhaustive: see *Giridharee Lall Roy* v. *Bengal Government* (1), *Muthusami Mudaliyar* v. *Simambedu* (2), *Amrita Kumari Debi* v. *Lakhinarain Chukerbutty* (3), *Ratnasubbu Chettu* v. *Ponnappa Chetti* (4), and Mayne's Hindu Law (7th Edition) page 688.

The *atma-bandhus* mentioned in section 6, verse 1 of Chapter II of the Mitakshara, are first cousins of the propositus; *pitri-bandhus* are first cousins of the father; and the *matri-bandhus* are first cousins of the mother. In the first class therefore the common ancestor is the grandfather; in the second class the paternal great-grandfather; and in the third class the maternal great-grandfather. Inasmuch as all *atma-bandhus* (that is, descendants of the grandfather) come in before any *pitri-bandhus*, no one would be an *atma-bandhus* who was not descended from the grandfather; he would be a *pitri-bandhus*, or a *matri-bandhu*. The limit in each class, therefore is the common ancestor, and no one who is not descended at least from the great-grandfather would be a *bandhu* at all. The *bandhuships* would no doubt have to be mutual as settled by *Umaid Bahadur* v. *Udoi Chand* (5), and as the limit of ascendants would be the great-grandfather, so the limit in the descending line would be the great-grandson. This might contract the class of *bandhus* below the limit of 5 degrees through the mother, but it seems to be the clear

(1) (1868) 12 Moo. I. A. 448, 465.
(2) (1896) I. L. R. 19 Mad. 405; L. R. 23 I. A. 83.
(3) (1882) 2 B. L. R. F. B. 28, 37.
(4) (1882) I. L. R. 5 Mad. 69.
(5) (1880) I. L. R. 6 Calc. 119.

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reading of the Mitakshara, Chapter II, section 6, verse 1, and is in exact accordance with the dicta in *Umaid Bahadur* v. *Udoi Chand* (1) which are otherwise not easy to understand.

Reference was also made to *Guru Gobind Shaha Mandal* v. *Anand Lal Ghose* (2) per Mitter J.; Sarvadikari's Tagore Law Lectures, pages 288, 411; "Sacred Books of the East," Volume 14, page 93; Mayne's Hindu Law (7th Edition, page 698; Ghosh's Hindu Law, page 192, and Mitakshara, Chapter II, section 1, verse 6.

De Gruyther, K. C., in reply. The Smritis are not the final authorities in deciding questions of Hindu Law. In the present case the Mitakshara is the authority by which it must be decided: Morley's Digest, Volume I, page cci. of the Introduction. Under the Mitakshara the right to offer funeral oblations has nothing to do with the right to inherit, but propinquity in blood relationship alone gives the title to suceed: Dr. Jolly's History of Hindu Law (Edition 1885) pages 172, 173; Mitakshara, Chapter I, section 1, paragraph 2; and Dr. Jolly's History of Hindu Law, page 168. The limitation of 7 degrees for inheritance of *gotrajas* is not taken from the Achara Kanda, but from Manu, and is retained in the Mitakshara, Chapter II, section 5 paragraph 6. The limitation of 7 degrees, from the father in the Achara Kanda is a limitation of *sapinda* relationship in a different *gotra*. The argument, therefore, that the limitation of 5 degrees from the mother in the Achara Kanda, should be adopted for inheritance, because the limitation of 7 degrees from the father in the same Chapter has been adopted is entirely unsound. The provision for preceptors, pupils and the others would not be absurd, as is contended, if there were no

(1) (1880) I. L. R. 6 Calc. 119. (2) (1870) 5 B. L. R. 15.

limitation to *bandhu* relationship. The relationship must be proved, and though everybody might be a *bandhu*, only the nearest *bandhu* would succeed. No absurd results would be produced in the case of marriage. They only arise from applying the rule made for determining the relationship of a man and a woman for the purpose of marriage, in order to determine the relationship of two men for a wholly different purpose, namely inheritance. The respondents' contentions were inconsistent with the decisions in *Umaid Bahadur* v. *Udoi Chand* (1) and *Babu Lal* v. *Nanku Ram* (2) which cases are relied on by the High Court judgment appealed from. Reference was made to *Suba Singh* v. *Sarafraz Kunwar* (3), *Muthusami Mudaliyar* v. *Simambedu Muthukumaraswami Mudaliyar* (4), Mayne's Hindu Law, 7th Edition, pages 300, 308, 311, 325, 328, 683 to 685, 699 and 783 to 785 ; and Mandlik, page 358.

The judgment of their Lordships was delivered by

June 29. MR. AMEER ALI. The suit that has given rise to the present appeal was brought by the plaintiffs in the Court of the District Judge of Balaghat, in the Central Provinces of India, for possession of certain properties which originally belonged to one Laxmanrao, whose next-of-kin or *bandhus* they claim to be under the law of the Mitakshara.

Laxmanrao died in 1851, leaving him surviving his widow Jankibai and a daughter Chitkoobai, both since deceased. The defendant Venkatesh is Chitkoobai's husband. On Laxmanrao's death without male issue his inheritance devolved on Jankibai. She held possession of the properties in suit as a Hindu widow

(1) (1880) I. L. R. 6 Calc. 119.
(2) (1894) I. L. R. 22 Calc. 339.
(3) (1896) I. L. R. 19 All. 215.
(4) (1896) I. L. R. 19 Mad. 405 : L. R. 23 I. A. 83.

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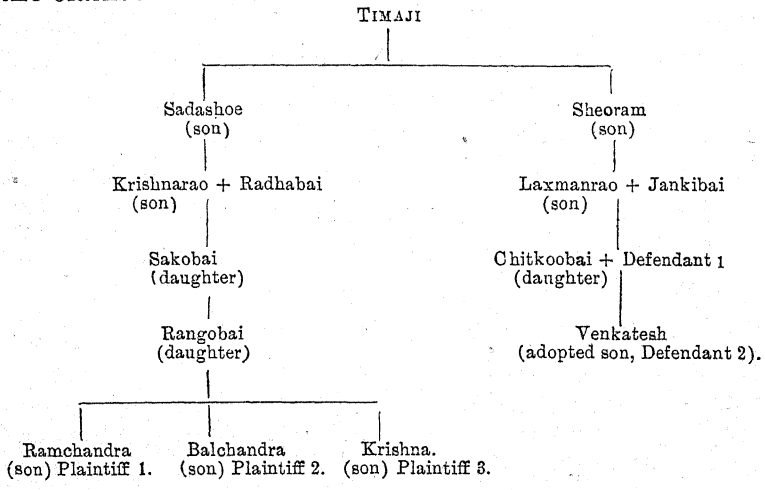
until her death in 1883, when Chitkoobai succeeded to her father's estate. She died on the 7th of May 1894, leaving the first defendant, her husband. The second defendant is a son adopted by him after Chitkoobai's decease.

The present action was not instituted until March 1906. The plaintiff's claim that the inheritance to Laxmanrao opened to them on the death of Chitkoobai, and that they are entitled to recover possession of the properties from the defendants who have no right of succession to Laxmanrao's estate.

The following genealogical table will explain the relative position of the parties and the exact nature of the claim :—



The defendants resisted the claim mainly on two grounds; they alleged, *firstly*, that the ancestors of the parties had migrated to the Central Provinces from Asirgarh, situated within the Mahratta country, where the law in force conferred on the daughter succeeding to her father's inheritance an absolute estate descendible to her own heirs; that the family of Timaji was still subject to that law, and that accordingly the estate which Chitkoobai had acquired passed on her

death without issue to the first defendant, her husband. In the second place, they urged that the plaintiffs had no heritable right or interest in Laxmanrao's estate as they did not come within the category of *bandhus* entitled to succeed to his inheritance.

The Courts in India have overruled the first plea, and have held that on settling in the Central Provinces the family of Timaji adopted the *lex loci* and are now governed by the rules of the Mitakshara generally in force in that province.

But they have given effect to the defendants' second contention; they have held in substance that the Mitakshara lays down a well-defined limit where the kinship entitling *bandhus* to succession ceases, and that the plaintiffs are beyond that limit. They have accordingly dismissed the suit.

The plaintiffs have appealed to his Majesty in Council, and the case has on both sides been argued with considerable ability and learning.

In dealing with the arguments addressed to this Board on behalf of the appellants their Lordships cannot help noticing one circumstance, viz., that in the Courts below, so far as appears from the record it was not denied that there was a limit to the heritable right of *bandhus*, the only contention being whether it was seven degrees from the common ancestor or five as urged by the defendants. Before this Board, on the other hand, it has been strenuously contended that there is no limit to the succession of *bandhus*. Their Lordships do not wish, however, to draw any inference from this change of ground, for what they have to determine in this appeal is whether the term *bandhu* is to be construed, as the plaintiffs argue, in the broadest sense, or whether it is subject to any limitation, and in the latter case what that

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limitation is according to the law by which the parties are governed.

In the Hindu law the succession of heirs individually specified does not present much difficulty; the controversies and divergences amongst Hindu lawyers are chiefly concerned with collateral succession. Manu, the ancient sage, whose identity is lost in the mist of ages, but whose word is regarded as divine, after giving the rules regarding the succession of lineal male descendants and male ascendants, declares: "The property of a near *sapinda* shall be that of a near *sapinda*."* Sir William Jones in his translation of Manu's Institutes has rendered the passage somewhat differently, but for the purposes of the present judgment it is of little importance.

It is upon this enunciation that all the schools base the right of collaterals to succeed to the inheritance of a deceased person. This refers only to the succession of one male to another, for females inherit by express rules. The right of collaterals, therefore, is dependent on the existence of the *sapinda*-relationship between the *propositus* and the claimant. The contest that has arisen in the several schools is with regard to the meaning to be attached to the term *sapinda*, in other words, what does *sapinda*-relationship imply, and what is the true test for determining whether a particular person is a *sapinda* to the deceased or not? Jimutavahana, the author of the Dayabhaga, the guiding authority in the Bengal or Gauriya school, considers it to mean "community in the offering of funeral oblations." He draws his argument from the word *pinda*, which literally signifies a ball of rice offered at the performance of

* Chapter IX., v. 187. This is the translation given by Mr. Justice Banerjee in *Babu Lal* v. *Nanku Ram* (1).

(1) (1894) I. L. R. 22 Calc. 339.

obsequial rites. Mr. Lowndes is probably right, that in early times the right of inheritance was dependent on the right to participate in the offering of funeral oblations, a doctrine which is part and parcel of the Dayabhaga rules.

But it is also clear that Vijnaneswara, the author of the Mitakshara, who appears to have flourished towards the end of the 11th and the beginning of the 12th century of the Christian era, some five centuries before Jimutavahana, abandoned the ancient doctrine, and construed *sapinda*-relationship to arise from community of blood, or to use the quaint language of Hindu writers, "community of particles of the same body." His legal conception in this respect will appear clearly from a passage of the Mitakshara, Book I., chapter on Marriage, not included in Mr. Colebrooke's translation. To this passage their Lordships will have to refer later on in the course of this judgment.

Messrs. West and Bühler in their "Digest of the Hindu Law," whose merit and authority have been recognized by eminent Hindu lawyers, have examined in detail the doctrines of the Mitakshara on this point, and their general conclusion as to Vijnaneswara's legal conception of *sapinda*-relationship is summed up in the following words, that he based it "not on the presentation of funeral oblations but on descent from a common ancestor, and in the case of females also on marriage with descendants from a common ancestor." Mr. Colebrooke in his rendering of the Mitakshara has paraphrased *sapinda* as a relation "connected by funeral oblations," which resulted in virtually obliterating one of the main distinctions between the Benares and the Bengal schools. But it is now recognized that his paraphrase was erroneous, and that the true theory of *sapinda*-relationship

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propounded by Vijnaneswara was based on community of blood. It is on this theory of Vijnaneswara that the learned counsel for the appellants place their chief reliance. The plaintiffs, it is urged, are unquestionably related to Laxmanrao by tie of blood; they are, therefore, his *sapindas*, and consequently, in the absence of near kinsmen, entitled to his inheritance. It is to be remarked, as has been observed in previous cases before this Board, that the Hindu law contains its own principles of exposition, and that questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own lawgivers and recognized expounders.

The Mitakshara purports to be a commentary on the work of Yajnavalkya, who is supposed to have lived about the second century of the Christian era, about a thousand years before Vijnaneswara. In the Mitakshara he is spoken of in terms of deep veneration: and his doctrines, developed by Vijnaneswara, certainly show a marked advance over the legal conceptions of his predecessors. So far as their Lordships have been able to ascertain, the *bandhus*, or distant kinsmen related to the deceased through females, make their appearance as heirs first in Yajnavalkya's enunciations. Mr. Borrodaile, in the first volume of his Reports of the Bombay Sudder Dewany Adalut Decisions, has given a translation of the Index to the Mitakshara, which furnishes a general idea of the scheme of this great and important work of Hindu law. It consists of two books; the first called the *Acharadhyaya* "On Established Rules of Conduct or Ordinances"; the second the *Vyavaharadhyaya* "On the Laws and Customs of the People." Both books, however, are so inter-related that the rules of the

one can scarcely be construed without reference to the other.

It is to be noted that in the Vyavastha Chandrika the Book on "Established Rules of Conduct" is cited as the Achara Adhyaya ("Chapter or Book on Established Rules of Conduct"), whilst in the decisions of the Indian Courts and recent works on Hindu Law, it is referred to under the name of the Achara Kanda ("Division or Part relating to Established Rules of Conduct").

In the third chapter of the Achara Kanda, Vijnaneswara lays down the rules relating to the forbidden degrees of kindred, and here he defines his theory of relationship. A translation of this passage is to be found in the "Digest of Hindu Law," by West and Bühler, Vol. I., p. 120, and also in the judgment of the Bombay High Court in *Lallubhai* v. *Mankuvarbai* (1), which came on appeal to Her Majesty in Council, and was affirmed by this Board (2).

That passage runs thus :—

"He should marry a girl who is non-sapinda (with himself). She is called his sapinda who has (particles of) the body (of some ancestor, &c.), in common (with him), Non-sapinda means not his sapinda. Such a one (he should marry). Sapinda relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda relationship to his father because of particles of his father's body having entered (his). In like (manner stands the grandson in sapinda relationship) to his paternal grandfather and the rest, because through his father particles of his (grandfather's) body have entered into (his own). Just so is (the son a sapinda relation) of his mother, because particles of his mother's body have entered (into his). Likewise (the grandson stands in sapinda-relationship) to his maternal grandfather and the rest through his mother. So also (is the nephew) a sapinda-relation of his maternal aunts and uncles, and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs) ; likewise (does he stand in sapinda-relationship) with paternal uncles and aunts, and the rest.

(1) (1876) I.L.R. 2 Bom. 388.

(2) (1880) I. L. R. 5 Bom. 110 : L. R. 7 I. A. 212.

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So also the wife and the husband (are sapinda-relations to each other) because they together beget one body (the son). In like manner brothers, wives also are (sapinda-relations to each other), because they produce one body (the son), with those (severally) who have sprung from one body (*i.e.*, because they bring forth sons by their union with the offspring of one person, and thus their husbands' father is the common bond which connects them). Therefore one ought to know that wherever the word sapinda is used, there exists (between the persons to whom it is applied) a connection with one body, either immediately or by descent."

Then after refuting certain objections to his explanation of the word *sapinda*, Vijnaneswara proceeds thus:—

"In the explanation of the word 'asapindam' (non-sapinda, verse 52), it has been said that sapinda-relation arises from the circumstance that particles of one body have entered into (the bodies of the persons thus related) either immediately or through (transmission by) descent. But inasmuch as (this definition) would be too wide, since such a relationship exists in the eternal circle of births, in some manner or other, between all men, therefore the author (Yajnavalkya) says:—

Verse 53: "After the fifth ancestor on the mother's and after the seventh on the father's side."—"On the mother's side in the mother's line, after the fifth, on the father's side in the father's line, after the seventh (ancestor) the sapinda-relationship ceases; these latter two words must be understood; and therefore the word sapinda which on account of its (etymological) import (connected by having in common) particles (of one body) would apply to all men, is restricted in its signification, just as the word pankaja (which etymologically means "growing in the mud," and therefore would apply to all plants growing in the mud, designates the lotus only) and the like; and thus the six descendants, beginning with the son, and one's self (counted) as the seventh (in each case), are sapinda-relations." (West and Bühler, vol. I., p. 120).

The rendering of the above passages by Pandit Rajkumar Sarvadhikari though apparently more free is certainly instructive and interesting, and deserves quotation as showing what a learned Hindu scholar considered was in the mind of Vijnaneswara when defining the word *sapinda*.

"The Mitakshara then explains the following words in the next verse of Yajnavalkya, beyond the fifth and seventh degrees on the mother's side and the father's side respectively."

"It has been already explained, that the relation of sapinda exists by reason of the connection of the parts of the same body, both directly and indirectly. But such a relationship is possible everywhere, in some way or other, between all men in this wide, wide world without a beginning. So the definition would be too wide. It is for this reason that the sage limits it thus, 'Beyond the fifth, &c.

"The meaning is 'on the mother's side,' *i.e.*, in the line of the mother, after the fifth degree : on the father's side,' *i.e.*, in the line of the father, after the seventh degree, the relation of sapinda ceases.

"Although the word sapinda, therefore, may be applied in its etymological sense almost to all men, it is, there can be no doubt, limited in its signification to certain definite individuals ; just as the word mud-born is applied only to a lotus.

"Thus the father and the other accendants are six sapindas ; and the son and the other descendants are six ; and the man himself is the seventh. In case of the division of a line also, the enumeration should be made until the seventh degree, commencing from whence the direction of the line changes. This rule should be applied in every case." Sarvadhikari's Tagore Law Lectures, page 603.

Their Lordships have no manner of doubt that in the passages quoted above, Vijnaneswara was laying down rules for the limitation of *sapinda*-relationship generally.

It has been suggested in argument that this limitation is with regard to marriage only; that it defines the prohibited degrees within which a man cannot marry. A similar contention was put forward in *Lallubhai* v. *Mankuvarbai*(1). The observations on this point of the learned Judges, one of whom was the distinguished jurist, Mr. Justice West (co-author of the Digest, and afterwards Sir Raymond West) appear to their Lordships as extremely apposite to the present case.

Chief Justice Westropp in that case, at p. 426, said as follows :—

"It has been contended for the plaintiffs that in the above extracts from the Achara Kanda and the Sanskara Mayukha the respective authors were dealing with sapinda-relationship in its ceremonial aspect only, and

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that, when they wrote upon sapinda-relationship with reference to inheritance, they may be regarded as viewing sapinda-relationship in the same light as the author of the Dayabhaga and certain other commentators on Hindu law. But we think that the burden rests upon the plaintiffs to show that Vijnaneswara and Nilakantha regarded sapinda-relationship as resting on a different basis for the purpose of inheritence from that on which, dogmatically perhaps, but most distinctly, the one has placed it in the Achara Kanda and the other in the Sanskara Mayukha. We do not think that the learned counsel for the plaintiffs have given any good reason for assuming that the authors intended to make any such difference, nor is it likely that they did.

"The religious and ceremonial law of the Hindus as prevailing amongst castes, or in particular localities, is generally speaking, almost inseparably blended with their law of succession in the same castes or localities, an opposite condition being exceptional."

As a matter of fact, as Messrs. West and Bühler point out, Vijnaneswara expressly says "wherever the word *sapinda* is used there exists (between the persons to whom it is applicable) a connection with one body either immediately or by descent."

In *Umaid Bahadur* v. *Udoi Chand* (1) the learned Judges of the Full Bench (one of whom was a Hindu Judge of great eminence) express themselves on this point in the following terms:—

"Having taken great pains in accurately defining the word sapinda in the beginning of his work, and having said in clear words in the passage in question that 'one ought to know that wherever the word sapinda is used there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent, it is hardly reasonable to suppose that the author used the word in another part of the same work in a different sense. It is a well understood rule of construction amongst the authors of the Institutes of Hindu law, that the same word must be taken to have been used in one and the same sense throughout a work unless the contrary is expressly indicated".

Nor have the learned counsel for the appellants been in a position in this case to refer to any authority excepting one, which their Lordships will notice later on, in support of their proposition that the

(1) (1880) I. L. R. 6 Calc. 119, 126.

limitations of Vijananeswara on *sapinda*-relationship are confined to marriage, impurity, and exequial rites, and do not relate to inheritance.

The law of inheritance in the Mitakshara translated by Mr. Colebrooke, occurs in Book II., and forms chapter VI. of that part of the work. It is entitled "*Dayavibhaga*," or "partition of heritage." It is unnecessary to refer to chapter I. of Mr. Colebrooke's translation, or to the earlier sections of chapter II, as they deal with subjects which do not come within the purview of this judgment. It is with sections 5, 6 and 7, of chapter II that their Lordships are principally concerned. The rendering of the word *sapinda* as "relations connected by funeral oblations" runs throughout Mr. Colebrooke's translation. His arrangement of the matter is also different from the original where the subject of inheritance appears to be dealt with in a consecutive form in chapter VI.

Mr. Colebrooke has split it up into two chapters, divided into sections. (This circumstance is noticed in the Bombay judgment.) Section 5, chapter II. (in Mr. Colebrooke's Translation), deals with the succession of the *gotraja*, on failure of "brother's sons." Although *gotraja* is explained by the term *gentiles* borrowed from the Roman system, to which no doubt the Hindu system bears a remarkable analogy, it would be more convenient to adhere to the definition given in the Mitakshara itself. Omitting the English equivalents introduced into the translation, and retaining the Sanskrit expressions, the paragraphs run as follows:—

"3. On failure of the paternal grandmother, gotraja-sapindas, namely, the paternal grandfather and the rest, inherit the estate.

For bhinnagotra sapindas are indicated by the term bandhu.

4. Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and heir sons.

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5. On failure of the paternal grandfather's line, the paternal great-grandmother, the great grandfather, his sons and their issue, inherit. In this manner must be understood the succession of the samanagotra sapindas.

6. If there be none such, the succession devolves on samanodokas, and they must be understood to reach the seven degrees beyond sapindas, or else as far as the limit of knowledge and name extend. Accordingly, Vrihat Menu says, 'The relation of the sapindas ceases with the seventh person and that of samanodakas extends to the fourteenth degree, or, as some affirm, it reaches as far as the memory of birth and name extends. This is signified by gotra."

Their Lordships have preferred to adopt for the purposes of this judgment the translation which was before this Board in *Lallubhai's Case* (1).

It is to be observed that the rule in paragraph 3 is thus stated in the Viramitrodaya (Shastri Golap Chandra Sarkar's translation, p. 199) " on failure of the paternal grandmother, the paternal grandfather and the other *sapindas* of the same *gotra* are heirs; since the *sapindas* (or persons connected through the *pinda* or body) of a different *gotra* are included under the term *bandhu* or cognates."

The earliest expounders appear sometimes to have used the term *bandhu* to signify a *savinda* without any idea of including cognates. This is clear from a passage of the Viramitrodaya, (Shastri Golap Chandra Sarkar's Translation. p. 142) where, after quoting the rule as to the succession of collaterals given by Vishnu who places the *bandhus* immediately after brothers' sons, it says as follows:—" Here the term *bandhu* (kinsman) signifies a *sapinda*, and the term *sakulya* (distant kinsman) means a *sagotra*, or one descended from a common ancestor in the male line (other then a *sapinda*); if by the term *bandhu* the cognates of the father were comprised, then there would be a conflict with the order mentioned by

(1) (1880) I. L. R. 5 Bom. 110, 122, 123.

Jogiswara, the Contemplative Saint," *i.e.*, Yajnavalkya. Yajnavalkya himself employs the expression indiscriminately in various places to signify connections and friends. But in chapter II, of his *Dharmasastram*, he distinctly introduces *bandhus* as acquiring a heritable right on failure of the *gotraja*. The passage in Rao Vishwanath Mandlik's translation at p. 220, is as follows :—

"The wife, daughters, both parents, brothers, and likewise their sons, *gotrajas* (gentiles), *bandhus* (cognates), a pupil and a fellow-student. Of these, on failure of the preceding, the next following in order is heir to the estate of one who has departed for heaven leaving no *putra* (lineal male descendants)."

Learned counsel for the respondents urges that this inclusion of *bandhus* or cognates forms a marked extension of the right of inheritance to people who until then were not regarded as heirs, and he contends that it is hardly likely this remarkable change should have been made without any limitation, considering that the *sapinda*-relationship was subject to a limit.

To determine how far this contention is well-founded, it is necessary to examine a little more closely the doctrines of the Mitakshara relating to the succession of collaterals. Vijnaneswara in reality seems to have shaped the rules which govern this branch of the law of inheritance in force in the Benares school. In paragraph 3, section 5, (Colebrooke's Translation) in describing the *gotraja-sapinda* or consanguineous relations sprung from the same stock, he emphasises the fact of their being members of the same family by the specific statement that the *sapindas* belonging to a different family (*gotra*)—the *bhinna-gotra*—are included under the designation of *bandhus*. This is clearly borne out by the passage of the Viramitrodaya already referred to.

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Henceforth the word *bandhu*, therefore, has, in the system of the Mitakshara, a distinctive and technical meaning, in other words it signifies the *bhinnagotra-sapindas*.

In paragraph 5 for the word *gotraja-sapinda* is substituted the more definite term of *samâna-gotra sapinda*. With regard to this Messrs. West and Bühler observe that "The substitution of *samâna-gotra* for *gotraja*, as well as the employment of *bhinna-gotra* to designate the opposite of the term, both show that Vijnaneswara took *gotraja* in the sense of beloging to the same family." Commenting on the passage relating to the succession of the *gotraja-sapinda*, the Viramitrodaya, which is regarded as one of the most important commentaries on the Mitakshara, says "similarly to the seventh (degree) the *sapindas* of the same *gotra* take the estate of a person without male issue:" see Shastri Golap Chandra Sarkar's Translation, p. 199.

This limitation of the seventh degree appears in Yajnavalkya's Institutes, chapter I., paragraphs 52, 53, in these words:—"A man should marry a girl . . . . who is not a *sapinda* of him . . . . who is descended from one whose *gotra* and *pravara* are different from him; and who is removed five degrees on the mother's and seven on the father's side:" see Rao Vishwanath Mandlik's Translation, p. 167. The comment of Vijnaneswara on this text of Yajnavalkya has already been given *in extenso* in a previous part of this judgment, but the following lines may be quoted again with advantage:—"On the mother's side, in the mother's line after the fifth; on the father's side, in the father's line, after the seventh (ancestor) the *sapinda*-relationship ceases:" West and Bühler, page 119; Mayne's Hindu Law (7th edition), p. 691 parapraph 516.

The translation by Golap Chandra Shastri of the passage, in which these words occur, is important, as he is the authority on whose expositions the appellants chiefly rely. It runs thus :—

" While explaining the term non-*sapinda*, the *sapinda* relationship is stated to be directly or mediately through connection with one body, but that relationship of all persons may, in one way or other, be traced with all other persons in this world of eternal transmigrations of the soul with its minute body, and so it would include persons that are not intended to be included ; hence it is ordained :—

' and is beyond the fifth and seventh from the mother and from the father (respectively).'

' The purport is, that *sapinda* relationship ceases beyond the fifth from the mother, *i.e.*, in the mother's line, and beyond the seventh from the father, *i.e.*, in the father's line.' (Golap Chandra Sarkar's Hindu Law, p. 54.)

It is quite clear, therefore, that the limitation of the seventh decree with regard to the *samanagotra sapindas* given by Mitra Misra in the Viramitrodaya is taken from the rule enunciated by Vijnaneswara on Yajnavalkya in the Achara Kanda in respect of the cessation of *sapinda*-relationship,

Now, a *bhinnagotra sapinda* is a *bandhu* according to Vijnaneswara. The classification contained in section 6, chapter II. (Colebrooke's Translation) shows clearly who the *bandhus* are whom Vijnaneswara treats as *bhinnagotra sapindas* entitled to succession on failure of the *gotraja*. The passage as translated by Mr. Colebrooke runs thus :—

" 1. On failure of gentiles, the cognates are heirs. Cognates are of three kinds : related to the person himself, to his father, or to his mother ; as is declared by the following text, ' The sons of his own father's sister the sons of his own mother's sister, and the sons of his own maternal uncle must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, and the sons of his mother's maternal uncles, must be reckoned his mother's cognate kindred."

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"2. Here, by reason of near affinity, the cognate kindred of the deceased himself, are his successors in the first instance, on failure of them, his father's cognate kindred, or if there be none his mother's cognate kindred. This must be understood to be the order of succession here intended."

Here Mr. Colebrooke renders the word *gotraja* into gentiles, and *bandhus* into cognates. He also paraphrases the three classes under which Vijnaneswara groups the technical *bandhus*, viz., the *atma-bandhus*, the *pitri-bandhus* and the *matri-bandhus* as "cognates related to the person himself, to his father, or to his mother."

Their Lordships have little doubt reading these passages by the light of the comments in the Viramitrodaya, (at p. 200) that Vijnaneswara was using the term *bandhu* in a restricted and technical sense, as implying a relation belonging to a different family but united by *sapinda*-relationship. In fact he expressly says so (paragraph 3, section 5, chap. II.).

It is not disputed that the plaintiffs do not come within the three categories mentioned above. But it is urged on the authority of *Girdharilal Roy* v. *The Government of Bengal*(1) that the enumeration is not exhaustive but merely illustrative.

In that case the question for decision was whether a maternal uncle not being specifically included in the enumeration of *bandhus* in the *Mitakshara* was excluded from succession. Answering that proposition in the negative, and holding that although not expressly mentioned he was entitled to succeed as a *bandhu* this Board observed that the text did not purport to be an exhaustive enumeration of all *bandhus* "who are capable of inheriting," nor was it cited as such for that purpose by the author; and that it was used simply as a proof or illustration of his proposition that there are three kinds or classes of *bandhus*.

(1) (1868) 12 Moo. I. A. 448.

These remarks hardly warrant the contention, which is attempted to be based on them, that the classes specified by Vijnaneswara can be added to.

In the present case, however, it does not seem necessary to their Lordships to enter upon the determination of the question whether the classes can be extended, for the point at issue can be decided on other grounds.

The limitation of five degrees clearly applies, and can only apply to the *bhinnagotra sapindas*. But it is contended that this limitation is confined to prohibition in respect of marriage. As has already been observed, a part of the limitation appears to have been applied to the succession of *samanagotra sapindas*; their Lordships are unable to see on what principle can it be said that the other part relative to kinsmen, who are equally *sapindas* but belong to a different *gotra* or gens, must be restricted to matrimonial affinity.

Considerable reliance has been placed on the statement of the law by Shastri Golap Chandra Sarkar in his work on Hindu law. Great respect is due to the opinions of that learned lawyer. But it seems to their Lordships that their weight is considerably discounted by his desire, in order to prevent the deceased's property becoming so to speak derelict and thus escheating to the Crown, to bring in the caste-people of the deceased also as *bandhus*; and the somewhat uncertain note of his conclusion (at page 74) where he says :—

"The conclusion, therefore, which appears to legitimately follow from the foregoing consideration, is, that the word *bandhu* in the Mitakshara means and includes either all cognate relations without any restriction, or at any rate, all cognates within seven degrees on both the father's as well as on the mother's side."

Again, his attempt to widen the signification of the word *sapinda* by employing the English equivalent

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of *relation* does not seem to be supported by the definition of *sapinda*-relationship in the Mitakshara itself.

Reference has also been made to certain passages in Rao Vishwanath Mandlik's valuable work, in which he says that the *sapinda*-relationship for inheritance is not always the same as for marriage or impurity (arising from birth or death). That may or may not be; but in one part of his work to which the Judicial Commissioner has referred in his judgment, the learned translator of Yajnavalkya distinctly says that *sapinda* connection in general is "co-extensive with that for marriage purposes." Nor in this connection their Lordships think can the following passage in the Viramitrodaya be overlooked:—

"And the text, '*sapinda*-relationship, however, ceases in the seventh generation'—is to be explained consistently with the text of Yajnavalkya, namely, after the fifth and the seventh from the mother and the father (respectively) to mean that it remains in the seventh but ceases in the eighth generation. Hence, as in the case of the unmarried females, the *sapinda* relationship extending over three generations, as is declared in the chapter on impurity (occasioned by death, &c.) is considered to be with reference to that alone; so it is to be deemed that this *sapinda* relationship (extending to the fourth degree) is relative to succession alone." (Viramitrodaya, p. 157.)

In the absence of any authoritative text their Lordships do not see their way merely on abstract reasoning to displace a view of the law which has received the recognition of the Courts in India, and which the District Judge, an officer of great experience and learning, says is accepted by "public opinion." As has already been observed, the right of inheritance is founded on *sapinda*-relationship, which, under the Mitakshara, means consanguinity, in a distinct legal sense clearly explained by the author. This bond comes to an end with the fifth degree when the descent is through a female. It seems difficult to conceive

that the right to inherit should continue after the relationship on which it is founded, and which gives it birth, has come to and end.

In the case of *Umaid Bahadur* v. *Udoi Chand*(1) one of the tests employed for determining whether the defendant in that case was a *sapinda* of the propositus was the mutuality of *sapinda* relationship. The doctrine of mutuality is based on the rule enunciated by Manu, and is fully explained by Rajkumar Sarvadhikari in his lectures at page 690. Another well-known Hindu writer of the present day speaks thus of the above rule :—

"It is to be observed here that the wealth of a *sapinda* is taken by his nearest *sapinda*, according to the well-known text of Manu. From that text it follows that the relation of *sapindaship* must be mutual. Among agnates the relation of *sapindaship* is always mutual ; but among cognates it is not so in a few cases. In order to determine whether any persons are heritable cognates of the propositus 'it is necessary to see whether they are related as *sapindas* to each other :' *Umaid Bahadur* v. *Udoi Chand* (1). Unless *sapindaship* is mutual, one cannot be the heir of the other" (Commentary on Hindu Law by J. N. Bhartacharyya, p. 459).

In *Babu Lal* v. *Nanku Ram* (2), the rule of the Mitakshara enunciated in the Achara Kanda relative to *sapinda*-relationship in respect of marriage is assumed as applicable to inheritance. In fact the judgment proceeds on that basis ; and the order of *sapinda*-relationship with its limitations in Rajkumar Sarvadhikari's Tagore Law Lectures is adopted as representing a correct exposition of the Mitakshara law. The doctrine of mutuality is also explained in clear terms :—

"Again, a *sapinda* of the propositus to be capable of inheriting must satisfy a further condition, namely, that he must be so related to the propositus, that the propositus is also a *sapinda* of him either directly or through the father or the mother. The mutuality of *sapinda* relationship between the propositus and his heritable *sapindas* is assumed as a necessary condition

(1) (1880) I. L. R. 6 Calc. 119. (2) (1894) I. L. R. 22 Calc. 339.

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in the case of *Umaid Bahadur* v. *Udoi Chand* (1) and the authority for this is to be found in the text of Manu (chapter IX., 187) cited in the Mitakshara, chapter II., section III, verse 3, as interpreted by Balambhatta and Visweswara Bhatta, the two leading commentators on the Mitakshara. The text according to these commentators means this, the property of a near *sapinda* shall be that of a near *sapinda*. From this it is clear that a man in order to be a heritable *sapinda* of the propositus must be so related to him that they are *sapindas* of each other."

These two decisions of the Calcutta High Court have been challenged on the ground that they represent Dayabhaga views rather than the doctrines of the Mitakshara. To their Lordships the objection seems hypothetical and without any basis excepting the criticisms of Golap Chandra Shastri. One of the learned Judges who decided *Babu Lal's Case* (2) was the distinguished Judge and erudite Sanskrit scholar, Mr. Justice Gurudas Banerjee, who was not likely to allow his mind to be confused by Dayabhaga conceptions in determining a case under the Mitakshara law.

The general conclusion to which a close examination of the authorities leads their Lordships may be briefly stated as follows: (*a*) that the *sapinda*-relationship, on which the heritable right of collaterals is founded, ceases in the case of the *bhinnagotra sapinda* with the fifth degree from the common ancestor; (*b*) that in order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they are *sapindas* of each other, which is only a paraphrase of Manu's rule.

In the present case, the plaintiffs are Laxmanrao's paternal grandfather's son's son's daughter's daughter's sons. They are his *bhinnagotra* beyond the fifth degree, and, as the District Judge points out, the element of mutuality is wanting between them and Laxmanrao.

(1) (1880) I. L. R. 6 Calc. 119. (2) (1894) I. L. R. 22 Calc. 339.

Two considerations were strongly pressed on behalf of the appellants to induce their Lordships to extend the application of the *sapinda*-relation in the case of *bandhus* beyond the fifth degree mentioned in the Mitakshara. It was urged that it is hardly likely Vijnaneswara would give a right of inheritance to a spiritual preceptor or *guru* before kinsmen, however remotely connected. This argument appears to ignore the peculiar and intimate relationship which their Lordships understand exists in the Hindu system between the pupil and the *guru* who has to initiate him into the mysteries of the Vedic laws and rites, and under whose roof he has to pass many years of his life. It is easy to suppose that in such circumstances the mystical relationship between a spiritual preceptor and a pupil should be regarded as creating a far closer tie than remote relationship of blood.

As regards the other consideration which is based on the possibility of the Crown becoming a claimant in the presence of remote *bhinnagotra*, their Lordships need only observe that whether such a claim would be justified or even be likely to be advanced, it does not seem necessary to express an opinion in the present case.

Here the defendant is in possession of Laxmanrao's estate claiming as heir to his wife, Laxmanrao's daughter. The plaintiffs' suit is an action in ejectment, and they must, in order to succeed, strictly prove their title.

It is a matter of satisfaction to their Lordships that they find themselves in complete agreement with the learned Judges in the Courts below. The District Judge is himself a Hindu versed in Sanskrit, and has examined the authorities in original. His decision is entitled to great weight and consideration.

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Their Lordships are of opinion that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the costs of this appeal.

Appeal dismissed.

Solicitor for the appellants: *Edward Dalgado.*

Solicitors for the respondents: *T. L. Wilson & Co.*

J. V. W.

APPELLATE CRIMINAL.

Before Jenkins C.J., and N. R. Chatterjea J.

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Aug. 4.

RAM RANJAN ROY

v.

EMPEROR.*

Public Prosecutor, duty of—Duty to produce all the evidence in his power bearing directly on the charge—Duty to call all the available eye-witnesses in capital cases—Omission to examine material witnesses, effect of—Inference adverse to the prosecution arising therefrom—Practice.

The purpose of a criminal trial is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused; and the duty of a Public Prosecutor is to represent not the police but the Crown, and this duty should be discharged fairly and fearlessly and with a full sense of the responsibility attaching to his position.

It is not his duty to call only witnesses who speak in his favour.

Empress v. *Dhunno Kazi* (1) discussed and explained.

He should, in a capital case, place before the Court the testimony of all the available eye-witnesses, though brought to the Court by the defence, and though they give different accounts. The rule is not a technical one, but founded on common sense and humanity.

Reg. v. *Holden* (2) followed.

Where witnesses (who from their connection with the transactions in question must be able to give important information) are not called

* Criminal Appeals No. 439 and 440 of 1914, against the order of C. Twidell, Sessions Judge of Bankura, dated May 28, 1914.

(1) (1881) I. L. R. 8 Calc. 121, 124. (2) (1838) 8 C. & P. 609.

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without sufficient reasons being shown, the Court may properly draw an inference adverse to the prosecution.

Empress v. *Dhunno Kazi* (1) referred to.

A conviction under s. 114 of the Penal Code cannot stand where the abetment charged necessarily requires the presence of the abettor. To come within the section, the abetment must be complete apart from the presence of the abettor.

THE appellants were tried before the Sessions Judge of Bankura with the aid of assessors. Ram Ranjan Roy, a zemindar in the Bankura district, was charged under ss. 302 and $\frac{302}{114}$ of the Penal Code, respectively, with the murder of one Dhan Kristo Laik, and abetment by presence of the murder of Banwari Laik. Umesh Chandra Mookerjee, a *gomasta* of the zemindar, was charged, under ss. $\frac{302}{114}$, with being present and abetting the murder of Banwari Laik, and Madhab Mistri, a peon, was indicted under ss. 302 and 323, with the murder of Banwari, and simple hurt to one Hari Laik. The Judge acquitted Umesh altogether, but convicted Ram Ranjan only under ss. $\frac{302}{114}$ and Madhab under both sections. He sentenced them to transportation for life.

The facts alleged by the prosecution were as follows. Ram Ranjan went on the 6th March 1914 to the village of Dejuri and tried to induce his tenants to consent to an enhancement of their rents. On the 8th he sent for Banwari Laik, a tenant, through Madhab Mistri. Banwari having refused to pay the enhanced rent demanded, was being assaulted by the peon when Dhan Kristo went up to the zemindar and remonstrated, whereupon the latter and Umesh Mookerjee gave the peon orders to beat, saying "*mar salako.*" The peon first kicked Banwari and then struck him on the head with a *lathi* causing injuries from the effects

(1) (1881) I. L. R 8 Calc 121.

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of which he died, and he also beat Hari Laik. Ram Ranjan struck Dhan Kristo fatally with a *lathi*.

Two persons, Gosto Chatterjee and Ramanath Roy, *gomastas* of the zemindar, were eye-witnesses of the occurrence, but were not examined before the Committing Magistrate, nor called at the trial by the Public Prosecutor, though repeatedly requested to do so by the appellants' counsel. It appears that their names had been entered in the list of defence witnesses.

Mr. Eardley Norton, *Mr. Bagram* (with *Babu Manmatha Nath Mookerjee* and *Babu Probodh Chandra Chatterjee*), for the appellant. (In Appeal No. 439).

Mr. Bagram (with *Babu Probodh Chandra Chatterjee* and *Babu Mrityunjoy Chatterjee*), for the appellant. (In Appeal No. 440).

Mr. Donogh (with *Babu Manindra Nath Banerjee*), for the Crown, in both the appeals. The Public Prosecutor is only bound to call witnesses who speak in his favour: *Empress* v. *Dhunno Kazi* (1). Even under this decision he is not bound to call witnesses who would not speak the truth. The views there exressed as to the necessity of calling all witnesses able to give important information have been considerably modified in later cases. Refers to *Queen-Empress* v. *Ram Sahai Lall* (2), *Empress* v. *Kaliprosonno Doss* (3). In the present case the Public Prosecutor may well have supposed that the *gomastas* would not speak the truth, and that, having been cited as defence witnesses, they would presumably have been called by the accused. The Allahabad High Court has gone further than the Calcutta rulings, and given the prosecutor an absolute discretion: see *Queen-Empress* v. *Stanton* (4) and *Queen-Empress* v. *Durga* (5).

(1) (1881) I. L. R. 8 Calc. 121, 124. (3) (1886) I. L. R. 14 Calc. 245.
(2) (1884) I. L. R. 10 Calc. 1070. (4) (1892) I. L. R. 14 All. 521.
(5) (1893) I. L. R. 16 All. 84.

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[*Mr. Norton* was not heard on the point but he dealt with the evidence.]

JENKINS C. J. Ram Ranjan Roy, a zemindar in the Bankura district, Umesh Chandra Mookerjee, one of his *gomastas*, and Madhab Mistri, his up-country peon, have been charged with offences which resulted in the death of Dhan Kristo Laik and his nephew Banwari Laik, tenants of Ram Ranjan. The charges against Ram Ranjan were that he, on or about the 18th of March 1914, at Dejuri, committed murder of Dhan Kristo Laik by striking him with a *lathi* and thereby killing him, and also that he committed murder of Banwari Laik by being present and abetting Madhab Mistri in striking and thereby killing him. Umesh Chandra Mookerjee was also charged with the murder of Banwari by being present and abetting Madhab. The charge against Madhab Mistri was that he murdered Banwari, and that he caused simple hurt to Hari Laik.

Umesh has been acquitted. Ram Ranjan has been acquitted of the murder of Dhan Kristo, but convicted of the murder of Banwari by being present and abetting Madhab Mistri. And Madhab Mistri has been convicted of both the offences with which he was charged. The sentence in each case has been transportation for life. Ram Ranjan and Madhab have appealed, but no appeal has been preferred by the direction of the Local Government. We, therefore, have to assume that Ram Ranjan was not guilty of the murder of Dhan Kristo or of any offence against him of a lesser degree.

I will here state the broad features of the case for the prosecution, largely borrowing for the purpose from the first information as contained in Ex. I. Ram Ranjan, on the 6th of March, came to his village of

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Dejuri and put up at the Durga mela. He was anxious to secure his tenants' assent to an enhancement of their rents, and sent for some of them with a view to discussing the matter. The zemindar's demands were resisted, and ultimately on the 8th of March he summoned Banwari through Madhab Mistri, to whom I will in future refer as the Nagdi.

Banwari was taken to the Durga mela and detained there. What followed is thus described in the first information. "As he (that is Ram Ranjan) was having him (that is Banwari) assaulted by the aforesaid Nagdi for his not agreeing to pay rent at an enhanced rate, Dhan Kristo Laik went to Ram Ranjan Baboo and said 'yesterday you brought away a he-goat and have kept it tied, and today why are you having my nephew assaulted by the Nagdi?' On this Ram Ranjan Baboo and Umesh Mookerjee gave orders to the up-country Nagdi saying *mar salako*, whereupon the Nagdi wounded Banwari Naik by kicking him first and then striking him with a *lathi* on the head. Ram Ranjan Baboo has caused grievous hurt to my uncle Dhan Kristo Naik by striking him on the head with the *lathi* which was in his hand. The wounds on Banwari Naik and Dhan Kristo Naik are serious, There is no hope of their lives."

Besides the appellants and Dhan Kristo and Banwari, there were in the Durga mela at this time Umesh Chandra Mookerjee, Gosto Chatterjee and Ramanath Roy, all *gomastas* of the zemindar.

Even on the case for the prosecution the conviction of Ram Ranjan for murder under section 302 of the Indian Penal Code read with section 114 cannot stand for the simple reason that the only abetment charged necessarily required the presence of Ram Ranjan, while to come within section 114 the abetment must be complete apart from the presence of the abettor.

This was recognized by Mr. Donogh, who has appeared on behalf of the Crown, and he conceded that all he could ask for was a conviction of abetment of murder under section 109.

We must, therefore, see whether the evidence would justify a conviction of Ram Ranjan under that section. At the outset we are confronted with a serious difficulty by reason of the way in which this case was conducted before the Sessions Court. Gosto Chatterjee and Ramanath Roy were admittedly eye-witnesses of the occurrence, and yet the Public Prosecutor did not call them as witnesses notwithstanding repeated requests by Mr. Norton.

The Public Prosecutor cannot shelter himself behind the suggestion that he was able to form an opinion from evidence previously given that these men would not be truthful witnesses, for they were not even examined before the Committing Magistrate.

Mr. Donogh contended that the prosecution, even in a case of murder, was only bound to call witnesses "in their favour," and for this he relied on a remark attributed to Sir Arthur Wilson in the report of *Empress* v. *Dhunno Kazi* (1) at page 124. But this remark appeared to me so opposed to the established rule and also to the whole trend of the judgment that I examined the original record, and there found that the word used by the learned Judge was not "favour" but "power," and this is how the judgment is reported in 10 C. L. R. 151 (at p. 153). Obviously, therefore, Sir Arthur Wilson's authority cannot be invoked in favour of the prosecution's contention, and if, as we have been told, the conduct of the Public Prosecutor is in accordance with the general mufassal practice, the sooner the practice is stopped the better. The practice, if it exists, rests on a fundamental

(1) (1881) I. L. R. 8 Calc. 121, 124.

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misconception of the purpose of a criminal trial and the duty of a Public Prosecutor.

That purpose is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the police, but the Crown, and his duty should be discharged by him fairly and fearlessly, and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused is to be determined by the tribunals appointed by law and not according to the tastes of any one else.

It was, therefore, undoubtedly the duty of the Public Prosecutor, in a capital case like the present, to have placed before the trial Court the testimony of all available eye-witnesses. This duty is clearly illustrated by the case of *Reg.* v. *Holden* (1), where in a murder trial counsel for the prosecution did not propose to call an eye-witness because she was brought to Court by the defence. On that the presiding Judge remarked "she ought to be called. She was present at the transaction. Every witness who was present at a transaction of this sort ought to be called, and even if they give different accounts, it is fit that the jury should have their evidence so as to draw their own conclusion as to the real truth of the matter." This is no technical rule: it is founded on common sense and is dictated by humanity.

The omission of the Public Prosecutor has involved this case as it comes before us in what Mr. Donogh on behalf of the Crown has very justly described as mystery. Indeed he felt this mystery to be so embarrassing that he asked for a retrial or at any rate for an examination of the witnesses that had been called. But having regard to the time already

(1) (1838) 8 C. & P. 609.

occupied by the case and the expenditure incurred, this was opposed and reasonably opposed by the defence, and we must, therefore, dispose of the case on the record as it stands.

The sequence of events as described by the prosecution is improbable and unnatural and hardly accords with the connected actions of responsible human beings. There is obviously something kept back, something omitted which is required to link up the narrative, and to present a reasonable and connected story of what occurred.

The papers before us, however, disclose the description given by Gosto and Ramanath shortly after the event, and it is a description that acquires some value from its correspondence with the story told by Ram Ranjan in his first information, and the statement made by the Nagdi to the Magistrate on the 9th. Correspondence of this class may be attributed to concoction, but in estimating the probability of this it has to be borne in mind that Gosto and Ramanath did not escape with Ram Ranjan but were kept prisoners by the villagers, and that even when Ram Ranjan and Umesh were brought to Dejuri, where Gosto and Ramanath were, they were throughout kept first under police observation and then under arrest.

There was, therefore, no opportunity of concoction except in the presence and with the knowledge of the police, and the evidence discloses no such concoction. Nor is the opportunity of concoction in the case of the Nagdi obvious if regard be had to the statements of the *goalas*, who were also kept back, and, in my opinion, wrongly kept back by the prosecution. The importance of the story thus told by the defence is that it unmistakeably points to an angry inrush of the villagers into the Durga mela.

If this be true, the whole story takes a natural

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shape, and the improbabilities are smoothed out. Nor is there any unlikelihood in this story: on the contrary the record, with all its imperfections, discloses much that points in the direction of its truth, and supports the idea of an inrush and consequent scuffle and exchange of blows. Thus one of the prosecution witnesses says there were villagers outside the Durga mela before the occurrence. When the place was searched a *lathi* was found, and there is no suggestion that it belonged to the accused's party: there were indications of disturbance in the Durga mela: there were injuries on the Nagdi which both assessors think, and in my opinion rightly, were genuine and these injuries are suggestive of an attack on him with a *lathi*.

These matters may not alone amount to proof of an inrush and scuffle, but they certainly encourage the idea that the whole story has not been placed before us, and justify the application here of the view expressed by Sir Arthur Wilson in *Empress* v. *Dhunno Kazi* (1) that, where witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution.

I certainly infer that the prosecution has not placed before us a complete picture of what occurred, but has withheld that which would have been favourable to the accused.

I do not suggest that the prosecution story is wholly false: far from it. Thus I am convinced that it was a blow delivered by the Nagdi that caused Banwari's death, but I am far from satisfied that the prosecution have placed before us the circumstances that immediately led up to this fatal blow.

It may be that Dhan Kristo addressed the zemindar in terms which were regarded as impertinent, and that

(1) (1881) I. L. R. 8 Calc. 121, 124.

this village magnate called out "*maro salako*" or some such offensive and provocative expression. But I cannot for a moment suppose that he meant thereby to instigate the murder of his tenant, nor can I believe that the Nagdi to whom it was addressed so understood it. A cuff, a blow, or a kick was all that can have been intended, and curiously enough in the first information of the villagers it is said that, after the zemindar so called out, the Nagdi kicked Banwari first and not until after this struck him with the *lathi*. It is true that the villager who gave this information showed an anxiety to correct it when he came to give evidence. I wholly distrust this correction; it is unlikely that the head constable would write down an expression of that kind if it was not said to him, and though his statement was read to him at the time the villager did not then perceive the error upon which he promptly fastened in the witness box without any apparent aid.

It is possible that more astute minds than his realized that those words might help to save Ram Ranjan and Umesh from the gallows, and that they should be explained away. It is intelligible that the villagers, already exasperated by the high-handed action of the zemindar, went to their companion's aid when they heard the zemindar's order and saw the kick. If there was an inrush of villagers this would be the probable sequence of events, and the treatment of the case by the Public Prosecutor has made it impossible for us to hold with the assurance requisite on a capital charge that this did not occur.

I wish to say nothing in palliation of the zemindar's conduct or of his exclamation, if in truth it was uttered by him, but I am unable on the record as it stands to hold him guilty of instigating Banwari's murder or even the *lathi* blow which caused Banwari's death.

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Even if it be assumed that Ram Ranjan uttered the exclamation attributed to him, the only natural consequence of that was the kick described in the first information. That might have amounted to an offence but no charge has been made in respect of it. In the circumstances, therefore, we have no option but to acquit Ram Ranjan, but it may be hoped that his experience of the 8th of March will teach him the danger of having in his train a man armed with a deadly weapon when he is dealing with his tenants: for though he is not proved to be legally responsible for the crime, I can hardly suppose him to be so callous as to contemplate without some remorse his association with the killing of two of his villagers. The Nagdi is proved to have inflicted the blow, of which Banwari died, but I do not think the case justifies a conviction under section 302. At the same time the defence has not been able to establish a plea of private defence justifying what he did. We, therefore, convict him under section 304 and pass on him a sentence of 7 years' rigorous imprisonment. The appeal in respect of the offence on Hari fails, but the sentences will run concurrently.

Mr. Norton has told us of the fairness with which the Sessions Judge placed materials at his disposal for the purpose of the defence. This is as it should be, and I am further gratified with the treatment by the learned Judge of the assessors as disclosed by the record, and his careful and conscientious use of their experience. It is much to be commended and presents a pleasing contrast with the treatment of assessors which has sometimes come under my notice in other cases.

N. R. CHATTERJEA J. concurred.

E. H. M.

APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

ABDUL HAKIM CHOWDHURY

v.

HEM CHANDRA DAS.*

1914

June 25.

Appeal—Practice—Filing of certified copy of decree appealed from after the prescribed period of limitation, without leave of the Court, effect of—Inherent power of High Court—Ex parte order in application for review of order of dismissal passed at preliminary hearing, setting aside of, at final hearing of appeal—Civil Procedure Code (Act V of 1908) s. 151, O. XLI, rr. 1, 11, O. XLVII, rr. 4, 7—Limitation Act (IX of 1908) s. 5.

Where a certified copy of the decree appealed from was filed in the High Court after the prescribed period of limitation without leave of the Court, in an analogous appeal, and where the main appeal had already been dismissed at the preliminary hearing under O. XLI, r. 11 of the Code of Civil Procedure, but was restored on review, without notice to the respondent, after the aforesaid analogous appeal had been admitted by another Divisional Bench; at the final hearing of both these appeals on objection being taken by the respondent :—

Held, that the respondent was entitled to invoke the inherent powers of that Court;

Tikait Ajant Singh v. *Christien* (1) followed.

Held, also, that non-compliance with r. 4 of O. XLVII of the Code rendered the granting of an (*ex parte*) application for review (by the appellant) a nullity, as it was prejudicial to the respondent, and previous notice was necessary.

Held, further, that under r. 1, O. XLI, of the Code, filing of the decree of the Appellate Court was imperative, and an appeal could not be said to have been preferred until that decree was filed.

*Appeals from Appellate Decree, Nos. 790 and 2024 of 1912, against the decree of Jagan Mohan Sarkar, Subordinate Judge of Chittagong, dated Dec. 20, 1911, reversing the decree of Rasik Mohan Bhattacherjee, Munsif of Chittagong, dated Sept. 26, 1910.

(1) (1912) 17 C W. N. 862.

1914

ABDUL HAKIM CHOWDHURY v. HEM CHANDRA DAS.

SECOND APPEALS by Abdul Hakim Chowdhury and another, the defendants.

These appeals arose out of two rent suits in which there was no decision as to the rate of rent, though the defendants asked for reduction of rent. The decree of the lower Appellate Court was signed on the 22nd December 1911. Both appeals were filed in the High Court on the 10th April 1912. The main appeal No. 790 was filed on the last day with a certified copy of the judgment, which covered both the cases, and also of the decree which differed from the decree in the other suit. The analagous appeal No. 2024 was filed without certified copies of either judgment or decree. On the 17th June 1912, the memorandum of appeal in No. 2024 was returned to the appellant with a note under Order XLI, rule 1, stating that there was no copy of the decree appealed from. A copy had in the meantime been obtained on the 1st May 1912, but it was not filed till the 5th July 1912, before Sharfuddin and Richardson JJ. with a petition, without any affidavit or prayer for extension of time, and the appeal was registered on the 19th July 1912. It was admitted at the hearing under O. XLI, r. 11, of the Code before Stephen and D. Chatterjee JJ. on 2nd January 1913. Meanwhile the main appeal No. 790 had come up before Carnduff and Chapman JJ. under O. XLI, r. 11 of the Code, on the 24th June 1912 and had been summarily dismissed, and on the 13th February 1913, without notice to the other side the application for review of the aforesaid summary order of dismissal was granted by Carnduff and Champman JJ. At the final hearing of both these appeals, the respondent took objection to all these proceedings.

Babu Ram Doyal Dey, for the respondent. I have three preliminary objections: (*i*) the application

for review in S. A. No. 790 of 1912 was allowed out of time and without notice to the respondent; (*ii*) S. A. No. 2024 was filed and registered out of time; and (*iii*) no second appeal lies under section 153 (*b*) of the Bengal Tenancy Act, the value of the suits being less than Rs. 50 each. On the 1st February 1913, about a month after the analogous appeal 2024 had been admitted by Stephen and D. Chatterjee JJ. an application was made for review of the order of dismissal in S. A. No. 790, and was allowed on 13th February 1913 by Carnduff and Chapman JJ. without any notice to the respondents to whom a substantial right had already accrued under the previous order of dismissal.

[HOLMWOOD J. But the Court allowed the application].

It is open to me to object to it now under O. XLVII, r. 7, (*b*) and (*c*) of the Code. Though no appeal lies from an order of the High Court, still I can take this objection in this appeal, which is an appeal from the final decree in the suit. The order granting the review is to this effect:—"Having regard to the fact that an analogous appeal has been admitted by two learned Judges, who, we are informed, were told that we had summarily rejected the appeal, we think this latter also should be admitted." This application was not supported by any affidavit explaining the delay of one month since the other appeal was admittted. I ought to mention that there was a note at the end of the application as follows:—"Petitioner prays for extension of time under sections 5 and 14 of the Limitation Act."

As regards S. A. No. 2024, I submit that no appeal was filed on 10th April 1912, only a memorandum of appeal without the necessary copies required by Order XLI, r. 1 of the Civil Procedure Code having been filed.

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Even the memorandum was filed out of time by about 20 days. The application filing the copy of the decree was not supported by any affidavit and did not contain any prayer for extension of time under s. 5 of the Limitation Act. It merely says that the copy was not filed through mistake. The copy actually filed, took only 9 days to obtain, and even that period cannot be deducted. Had the copy been filed as soon as it was received, both the appeals would have been dismissed together on 24th June 1912. It is not explained why there was a delay of more than one month in filing it, nor did the Court excuse this delay or the previous delay in filing the memorandum of appeal out of time.

My last objection is that no second appeal lies under the provisions of s. 153(*b*) of the Bengal Tenancy Act, the learned Subordinate Judge having found against the plea of the defendants and decreed the suit for rent on the basis of the contract between the parties. No doubt an appeal lay from the decision of the Munsif as he allowed a smaller rate of rent than that claimed by the plaintiff, but there was no occasion for the Subordinate Judge to decide, nor did he in fact decide, any question as to amount of rent. I refer to your Lordship's decision in a recent Rule No. 644 of 1914 decided on 23rd June 1914.

Babu Prabodh Kumar Das, for the respondent. I submit that a second appeal lies, as the defendant claimed reduction of rent under section 52 of the Bengal Tenancy Act.

[HOLMWOOD J. We want to hear you first on the other objection, which is a serious one.]

I distinctly asked for extension of time and it was allowed. I even asked their Lordships for a notice on the other side when the review was allowed, but their Lordships thought it was unnecessary. I am

told that as a matter of practice no notice is issued in such cases.

[*Babu Ram Doyal De.* No, that is not the practice.]

[HOLMWOOD J. It is not a question of practice, when the law lays down that notice must be given. What is the rule under which you can now dispute the order in. S. A. No. 2024? You have given us the rule which you rely on in the case of review in the other appeal.]

[*Babu Ram Doyal De.* There is no such rule, but there are two decisions of your Lordships holding that *ex parte* admission of applications may be disputed at the final hearing: *Tikait Ajant Singh* v. *F. T. Christien* (1) and *Bhismadeo Das* v. *Sita Nath Ray* (2).

HOLMWOOD J. These two appeals, Nos. 790 and 2024 of 1912, relate to a litigation for rent which has been going on since 1906. The proceedings by which they have now come before us illustrate in the most extraordinary way the ease with which questions of limitation and fatal irregularities may escape the notice of several Benches in succession unless facts are properly brought to the notice of the Judges at the time applications are made.

The history of this case is as follows. A suit was brought for rent in 1906 which was decided *exparte.* Towards the close of three years execution was taken out and the defendants applied for rehearing. The Munsif restored the suit. In the meantime another rent suit against the same defendants had been filed in the year 1910. The suits were consolidated and the Munsif decreed the suits with modifications. On appeal the lower Appellate Court reversed the decision of the Munsif and decreed the plaintiff's suit in full

(1) (1912) 17 C. W. N. 862. (2) (1912) 17 C. W. N. 42.

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on the 20th December 1911. The decree was signed on the 22nd December 1911. The appeals were filed in this Court in the two cases on the 10th April 1912. Appeal No. 790 appears to have been filed on the last day with a copy of the judgment which covered both the cases, and of the decree in Appeal 790 which differed from the decree in the other suit. Appeal No. 2024 was filed without any copy of decree or judgment, and it is alleged that inasmuch as the copies might have taken less time in that case that it was not filed within the period of limitation. But this of course we cannot now go into, as we cannot assume that it would have taken any different time to get copies in this case to what it did in the other. On the 17th June 1912, the memorandum of appeal in 2024 was returned to the appellant with a note under Order XLI, rule 1, that there was no copy of the decree appealed from. A copy had been obtained on the 1st May 1912 and it was filed by the appellant on the 5th July 1912. Appeal 790 came up before a Bench of this Court under Order XLI, rule 11, on the 24th June 1912 and was summarily dismissed.

The copy of the decree, which was filed on the 5th July 1912, was accepted. There was no prayer for extension of time, although it was mentioned in a note that the copy was out of time. But to avoid the law of limitation, section 5 of the limitation act would have to be applied, and we find that no order stating that the Court was satisfied, as is required by that section, was recorded. Curiously enough Appeal 2024, which was an analogous appeal filed at the same time as 790 did not come on for hearing under Order XLI, rule 11, until the 2nd January 1913 before another Bench. That Bench admitted it without being told that it was barred by limitation and without any adjudication upon that point. Thereupon a review of

the order of dismissal in Appeal 790 was filed before another Bench, that is the fourth Bench before which these cases had come and was granted on the 1st February 1913 without notice to the other side.

Now whether, as speaking for myself, I am able to hold that Order XLVII, rule 7, enables the respondent to take objection before us now in this appeal from the final decree or order passed or made in the suit, or whether he is entitled to invoke the inherent power of this Court as both of us are prepared to hold and, as was held in the case of *Tikait Ajant Singh* v. *F. T. Christien* (1), it is clear that the non-compliance with rule 4 of Order XLVII renders the granting of this application for review, which was prejudicial to the respondent, a nullity and that such an application could not be granted without previous notice. We have already shown that under Order XLI, rule 1, filing of the decree of the Appellate Court is imperative, and that the appeal cannot be said to have been preferred until that decree is filed. Appeal 2024 is therefore clearly barred by limitation.

That being so, the preliminary objection must prevail and both the appeals must be dismissed. The question whether any second appeal lay on the matters found by the Subordinate Judge is one which we need not go into. The amounts are very small and in dismissing these appeals with costs, we think that a single hearing fee of one gold mohur is sufficient for both these appeals.

CHAPMAN J. concurred.

Appeals dismissed.

G. S.

(1) (1912) 17 C. W. N. 862.

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

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June 5.

UPENDRA NATH KALAMURI

v.

KUSUM KUMARI DASI.*

Execution of Decree—Shebait—Claim preferred by successor in office of judgment-debtor (adverse to his own interests) as the legal representative —Order made, whether under scope of Civil Procedure Code (Act V of 1908), s. 47, or O. XXI, rr. 58, 60—Appeal therefrom, competency of —Civil Procedure Code (Act V of 1908), ss. 2, sub. s. (2), 96, 104; O. XLIII, r. 1.

Where X in execution of a decree for money against Y as shebait of a deity attached and proceeded to sell properties of which Y or his successor in office had alleged that he was in possession, not as shebait of the deity but in his own right :

Held, that the case did not fall within the scope of section 47 of the Civil Procedure Code of 1908 as Y in his character of shebait, the only character in which he was a party to the suit, could not rightly be deemed the same person in his character as a private individual.

Kartick Chandra Ghose v. *Ashutosh Dhara* (1) followed.

That the order of the original Court must be taken to have been made under r. 60 of O. XXI, which recognised a broad distinction between the representative character and the personal character of the same individual : and that, in consequence, the appeal to the Subordinate Judge was incompetent.

Punchanun v. *Rabia Bibi* (2) distinguished and explained.

Per MOOKERJEE J. When X in execution of a decree for money against Y seeks to proceed against Z as the legal representative of Y who is liable only to the extent of the assets of Y in his hands, and a question arises

* Appeal from Appellate Order, No. 184 of 1910, against the order of Prabha Chandra Sinha, Subordinate Judge of Midnapore, dated Feb. 11, 1910, confirming the order of Lal Behari Chatterjee, Munsif of Midnapore, dated Sept. 13, 1909.

(1) (1911) I L. R. 39 Calc. 298. (2) (1890) I. L. R. 17 Calc. 711.

whether a particular property does, or does not, constitute such assets, it must be determined by the execution Court under section 47 of the Code.

Per BEACHCROFT J. If the claim of the objector is really in his own interests as representative of the judgment-debtor, the case will come under section 244 (of the Code of 1882); if the claim is adverse to his interest as representative, it will not.

APPEAL by Upendra Nath Kalamuri and Sashi Bhushan Kalamuri, the objectors.

The facts are briefly as follows. On the 7th April 1904, Kusum Kumari Dasi, widow of one Harnarain Dutt, deceased, of Barabazar, Midnapore, obtained a decree for money against one Gobardhan Kalamuri described as the shebait of the goddesses, Lakshmi and Bhagabati, to whom certain properties were alleged to have been dedicated by a *niyampatra*, dated 16th Asarh 1284 *Amli* (corresponding to 29th June 1877). On the 28th July 1909, the decree-holder applied in the Court of the Munsif of Midnapore, for execution of the decree by sale of certain properties of the aforesaid goddesses, stating in her petition that the judgment-debtor was dead; and prayed that execution might proceed after service of notice on the deceased's three paternal uncles and five nephews under r. 22 of O. XXI of the Code of Civil Procedure, as she did not know who was the shebait. On the 19th August 1909, after issue of notices, a petition of objection under r. 58 of O. XXI, was filed by the two uncles alone, *viz.*, Upendra Nath Kalamuri and Sashi Bhusan Kalamuri, urging, *inter alia*, that the properties sought to be attached had not been dedicated to the goddesses, Lakshmi and Bhagabati, but were the private secular properties of the objectors, though under the *niyampatra* deed, dated 29th June 1877, a portion of the income of the properties had been directed by the then proprietor to be applied for religious purposes. On the 13th September 1909, the

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learned Munsif directed execution to proceed, deciding against the objectors. On appeal, the Subordinate Judge of Midnapore, on 11th February 1910, confirmed the order of the Court of first instance on the merits, being doubtful whether the appeal was really incompetent. The objectors then appealed to the High Court.

Mr. S. P. Sinha and *Babu Mohini Mohan Chatterjee*, for the appellants.

Dr. Rashbehari Ghose and *Babu Khetra Mohan Sen*, for respondents.

Cur. adv. vult.

MOOKERJEE J. This appeal is directed against an order by which the Subordinate Judge has confirmed an order of the Court of first instance for execution of a money decree. On the 7th April 1904, the respondent obtained a decree for money against one Gobardhan Kalamuri described as the shebait of goddesses Lakshmi and Bhagabati. Before the decree could be executed in full, the judgment-debtor died. On the 28th July 1909, the decree-holder applied for execution of the decree by the sale of a one-fourth share of 260 bighas of land within certain boundaries. She stated in her petition that the judgment-debtor was dead, that he had left five nephews (sons of different sisters) as also three paternal uncles, that one or more of these persons had succeeded as shebait of the endowment, but that as plaintiff had not been able to ascertain who was the shebait, she prayed that execution might proceed after service of notice on all these persons under rule 22 of Order XXI of the Civil Procedure Code, 1908. Notices were issued accordingly. The nephews of the original judgment-debtor took no notice of the proceedings, but on

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the 19th August 1909, two of the uncles filed a petition of objection, in which they urged, amongst other things, that the properties sought to be attached had not been dedicated to the goddesses named but were private secular properties of the objectors, though under a deed, dated the 29th June 1877, a part of the income of these properties had been directed by the then proprietor to be applied for religious purposes. It transpired at the same time that the other uncle of the judgment-debtor, who had not entered appearance, had died on the 10th August; the decree-holder thereupon applied that the two objectors who had appeared might be treated as the representatives of the deceased; this was granted. The Court then proceeded to investigate the objection and, on the 13th September 1909, came to the conclusion that the properties sought to be attached had been dedicated to the goddesses named; in this view, the Court overruled the objection and directed execution to proceed. The objectors then appealed to the Subordinate Judge. When the appeal came on for hearing, a preliminary objection was taken by the decree-holder respondent that the appeal was incompetent, as the order could not be deemed to have been made under section 47 of the Code. The Subordinate Judge expressed himself in favour of this view, but as he felt doubtful whether the appeal was really incompetent, he considered the case on the merits and ultimately confirmed the order of the original Court. The objectors have appealed to this Court and have contended, *first*, that the appeal to the Subordinate Judge was competent, and, *secondly*, that he has misunderstood the legal effect of the deed of the 29th June 1877.

To determine whether the appeal to the Subordinate Judge was competent, it is necessary to ascertain

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whether the order of the primary Court falls within the scope of section 47. The answer to the question, whether an order in execution proceedings is within the scope of this section, depends upon its nature and contents. If it decides a question relating to the execution, satisfaction or discharge of the decree, and if the decision has been given between the parties to the suit or their representatives in interest, the order of the Court falls within the scope of this section, is a decree within the meaning of section 2, and as such is appealable under section 96: *Raghubar* v. *Jadu Nandan* (1), *Joytara* v. *Prankrishna* (2). It can not be disputed that the order of the original Court decided a question relating to the execution of the decree held by the respondent, namely, whether the decree could be executed by attachment and sale of the property specified in the application of the decree-holder. But the point remains, whether this question arose between the plaintiff decree-holder on the one hand, and the defendant judgment-debtor or his representatives on the other hand. It is plain that if and in so far as there was an endowment, the objectors were the legal representatives of the judgment-debtor, within the meaning of that expression as defined in section 2, clause (*ii*) of the Code; the original defendant had been sued in a representative character as the shebait of the two goddesses named; the objectors had succeeded to the office of shebait and the estate held by the deceased as shebait had devolved on his successors in office. This view is in accord with the elementary rule that when a decree has been passed in a suit against a shebait as representing an idol, it is binding on the succeeding shebait, provided it has been passed without any fraud

(1) (1911) 15 C. L. J. 89. (2) (1910) 13 C. L. J. 257.

or collusion: *Prosunno Kumari* v. *Golab Chand* (1), *Tulsidas* v. *Bejoy* (2), *Manikka* v. *Balagopalkrishna* (3). But when a decree has been passed against a person in his capacity as shebait, execution can be taken out only against the properties of the endowment in his hands; for as Subramania Ayyar, J., observed in *Venkatasami* v. *Kuppeyee* (4), the private property of an individual cannot be taken in execution of a decree made against him in his capacity as manager or trustee of an endowment, just as the property of the endowment cannot be taken in execution when the decree against him is in respect of his personal debt. The two capacities are fundamentally distinct, and the individual constitutes two distinct juristic persons from the two different points of view. In the present case, the decree-holder seeks to proceed against the property on the assumption that the appellants hold it as part of the endowment of the two idols named. The objectors, on the other hand, assert in their personal capacity, that this is their private property and is not available to the decree-holder for satisfaction of her decree. That decree is essentially against the debutter estate, though, as pointed out by their Lordships of the Judicial Committee in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (5), the suit was bound to be brought against the shebait as such, because it is only in an ideal sense that an idol, though regarded as a juristic person, can hold property. The true position, consequently, is that the question raised by the objectors calls for decision between the decree-holder who is a party to the suit and two persons who are not, for this purpose, representatives of the original

(1) (1875) L. R. 2 I. A. 145: 14 B. L. R. 450: 23 W. R. 253.
(2) (1901) 6 C. W. N. 178.
(3) (1906) I. L. R. 29 Mad. 543.
(4) (1904) 14 Mad. L. J. 377.
(5) (1904) 32 Calc. 129: L. R. 31 I. A. 203.

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defendant, as they raise the objection, not in their capacity as shebait, but in their private individual capacity. This view is supported by the decision of the Full Bench in *Kartick Chandra* v. *Ashutosh Dhara*(1). There it was ruled that when X, in execution of a decree for money against Y personally, attaches and proceeds to sell properties of which Y alleges that he is in possession, not in his own right but as shebait of a deity to whom the properties have been dedicated, the case does not fall within section 244 of the Code of 1882 or section 47 of the Code of 1908. The principle recognised by the Full Bench is that there is a fundamental distinction between a right acquired or liability incurred by Y in a personal capacity, and a claim advanced or defence interposed by the same individual in his capacity as shebait of a deity. If this distinction is borne in mind, the inference follows that when X, in execution of a decree for money against Y as shebait of a deity, attaches and proceeds to sell properties of which Y or his successor in office alleges that he is in possession, not as shebait of the deity, but in his own right, the case does not fall within the scope of section 47. Y, in his character as shebait, the only character in which he is a party to the suit, cannot rightly be deemed the same person in his character as a private individual. We may add that the decision of the Full Bench in *Punchanun* v. *Rabia Bibi* (2), on which reliance was placed by the appellants, is not directly in point and does not assist their contention. That case is an authority only for the proposition that when X, in execution of a decree for money against Y, seeks to proceed against Z as the legal representative of Y, who is liable only to the extent of the assets of Y in his hands, and a question arises, whether a particular property does or does not

(1) (1911) I. L. R. 39 Calc., 298. (2) (1890) I. L. R. 17 Calc. 711.

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constitute such assets, it must be determined by the execution Court under section 47 of the Code. Nor is the contention of the appellant supported by the cases of *Moharaj Kumar Bindeswari* v. *Thakur Lakpat Nath* (1), and *Umeshananda* v. *Mohendra Prosad* (2). The former case shows that where a party has obtained an order in his favour on the footing that the Court was competent to deal with the matter and make the order under section 47, he cannot, when the validity of the order is challenged by way of appeal, impugn the appeal as incompetent on the ground that the order could not have been made under section 47. The latter case is an authority for the proposition that where a decree has been obtained against a person (who had been really removed from the office of shebait) on the erroneous assumption that he is still the shebait, and upon application made to execute such decree against his successor in office, an objection is raised that there is no valid decree capable of execution against the properties of the endowment, the question falls within section 47, because a question was raised, who was the representative of the judgment-debtor, which could be determined only under clause (*3*) of that section. Reference was finally made to the decisions of their Lordships of the Judicial Committee in *Chowdry Wahed Ali* v. *Jumaee* (3) and *Abidunnissa* v. *Amirunnissa* (4), neither of which lays down any principle contrary to the view I propose to take. The first case affirms, what must now be regarded as incontestable, namely, where a decree against a person in a representative capacity has been properly passed and proceedings have been taken thereunder to obtain execution against him in

(1) (1910) 15 C. W. N. 725.
(2) (1911) 14 C. L. J. 337.
(3) (1872) 11 B. L. R. 149.
(4) (1876) I. L. R. 2 Calc. 327; L. R. 4 I. A. 66.

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his representative character, he is a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree. The second case shows that section 11 of Act XXIII of 1861 (which with important modifications now stands as section 47 of the Code of 1908) was not intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree.

It follows that the order of the original Court was not made under section 47 and was not a decree liable to be challenged by way of appeal. It must be taken to have been made under rule 60 of Order XXI, although it may be difficult to make the language of that rule fit in precisely with a case in which the defendant has been sued in a representative capacity and prefers a claim in his personal capacity. The rule, however, recognises a broad distinction between the representative character and the personal character of the same individual. In this view, the appeal to the Subordinate Judge was incompetent, and no opinion need be expressed on the question, whether the objection is well founded on the merits. The appeal is consequently dismissed with costs.

BEACHCROFT J. In this case a very real difficulty is raised by the decisions in the cases of *Punchanun* v. *Rabia Bibi* (1) and *Kartick Chandra Ghose* v. *Ashutosh Dhara* (2). Both are decisions of a Full Bench. In the first of these two cases, it was decided that an objection by the representative of the judgment-debtor in execution to the effect that the property attached was his own and not held by him as such representative was cognisable only under section 244 of Act XIV of 1882, (section 47 of the

(1) (1890) I. L. R. 17 Calc. 711. (2) (1911) I. L. R. 39 Calc. 298.

present Code). *Primâ facie* that decision would seem to cover the present case. The appellant has been brought on the record as the representative of the original judgment-debtor and his claim is that the property is his own, and that he does not hold it as shebait. In the second of the above cases, it was decided that when the objector alleges that he is in possession, not in his own right but as shebait of a deity to whom the property has been dedicated, the order passed is one under section 278 of the old Code (now O. XXI, r. 58). The ground on which the decision proceeded was that while the objector was a party to the suit in one capacity, the claim was advanced by him in another, and consequently the question did not arise between the parties to the suit in which the decree was passed and therefore was not one to be determined under section 244.

Now, if this be taken to be the underlying principle to be applied in cases of this nature, it might also have been applied in the case of *Punchanun* v. *Rabia Bibi* (1), for while the objector claimed the property as her own in her personal right, she was a party to the suit, only because she was the widow of the original judgment-debtor and therefore liable to the extent of the assets which had come into her hands.

So far then, as the principle was recognised in one case and ignored in the other, the two cases would seem to be in conflict. But the learned judges who decided the latter case distinguished it from the earlier one on the ground that it dealt with the converse question. If that be a real ground of distinction, it might be said that the present case being also the converse to the case of *Kartick Chandra Ghose* v. *Ashutosh Dhara*(2), is not concluded by that decision, but should follow that in *Punchanun* v. *Rabia Bibi*(1).

(1) (1890) I. L. R. 17 Calc. 711. (2) (1911) I. L. R. 39 Calc. 298.

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The distinction, however, fails when it is attempted to apply it to the facts of the case before us, for here we again have one person in a dual capacity, a state of things which was the foundation of the decision in *Kartick Chandra* v. *Ashutosh* (1).

Can then the two cases be reconciled? One possible view occurs to me; it is this. If the claim of the objector is really in his own interests as representative of the judgment-debtor, the case will come under section 244, if the claim is adverse to his interest as representative, it will not. If this be a correct test, it will satisfy the conditions in the case of *Punchanun* v. *Rabia Bibi*(2), for the widow's claim in her personal right was in her interests as representative of the judgment-debtor. It will satisfy the conditions in *Kartick Chandra* v. *Ashutosh* (1), for the objector's claim as shebait was adverse to his interests as representative of the judgment-debtor. Applied to the present case, it provides a feature distinguishing it from the case of *Punchanun* v. *Rabia Bibi* (2), and a solution in accord with the principle underlying the case of *Kartick Chndra* v. *Ashutosh* (1). I, therefore, agree in dismissing the appeal.

G. S. *Appeal dismissed.*

(1) (1911) I. L. R. 39 Calc. 298. (2) (1890) I. L. R. 17 Calc. 711.

APPELLATE CIVIL.

Before D. Chatterjee and Walmsley JJ.

AMBIKA PRASAD SINGH

v.

PERDIP SINGH.*

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July 2.

Costs—Partition—Civil Procedure Code (Act V of 1908) s. 107, O. XLI, r. 4, application of—Appellate Court, power of.

It is not necessary for the application of O. XLI, r. 4 of the Code of Civil Procedure that the decree should proceed on every ground common to all the plaintiffs or defendants. It is quite sufficient if it proceeds on any ground common to the party to which the appellant belongs.

Under s 107 of the Code the Appellate Court has the same power as the Court of first instance.

Shama Soonduree Debia v. *Jardine Skinner & Co.* (1), *Dildar Ali Khan* v. *Bhawani Sahai Singh* (2) and *Ram Kamal Saha* v. *Ahmal Ali* (3) referred to.

APPEAL by Ambika Prasad Singh, the defendant No. 1.

This appeal arose out of a suit for the partition of a mouza called Patailia in which the parties had different shares. The defendant No. I appealed against the final decree upon two grounds: *first*, that the allotment of shares was improper; and, *secondly*, that the costs before the preliminary decree should not have been allowed in favour of the plaintiff.

As regards the first point, the High Court, varying the order of the learned judge, restored the

* Appeal from Original Decree, No. 145 of 1910, against the decree of Charu Chandra Mukherjee, Subordinate Judge of Darbhanga, dated Dec. 22, 1909.

(1) (1859) 12 W. R. 160. (2) (1907) I. L. R. 34 Calc. 878.
(3) (1903) I. L. R. 30 Calc. 429.

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arrangement made by the commissioner who had allowed the appellant one block to the north. As regards the second part, each party was directed to bear its own costs.

Babu Ganesh Dutt Singh, for the appellant.

Babu Jogesh Chandra Roy, *Babu Rajendra Chandra Guha*, *Babu Kulwant Sahai*, *Babu Anilendra Nath Roy Chowdhury*, for the respondents.

D. CHATTERJEE AND WALMSLEY JJ. This appeal arises out of a suit for the partition of a mouza called Patailia in which the parties have different shares. The defendant No. 1 appeals against the final decree on two grounds: *first*, that the allotment of shares is improper; and, *secondly*, that the costs before the preliminary decree should not have been decreed in favour of the plaintiff.

As regards the first point, we think that the appellant has a good ground for complaint. The commissioner allowed him one block to the north; but the learned Judge has split that block up into three and allotted him the one farthest from his house. We think that he should have his portion of the northern block as near as possible to his house, that is to say, he will have his northern block from the north-east commencing from Nos. 1852, 1860, 1861, 1862 and go west-wards so as to make this block equal in value to the block which has been allowed him to the north-west. Defendant No. 5 will get the block to his west and defendants Nos. 2 to 4 will get the block to the west of defendant No. 5. The appellant will retain his eastern and south-western blocks and the allotment of blocks will be altered accordingly.

The next question is as to the costs. It is contended that the costs before the preliminary decree

should not have been allotted to the plaintiff and the cases of *Shama Soonduree Debia* v. *Jardine Skinner & Co.* (1) and *Dildar Ali Khan* v. *Bhawani Sahai Singh* (2) are quoted in support of this contention. As the appeal is by one of the defendants only, it is contended that, under Order XLI, rule 4, of the Civil Procedure Code, we can make a decree in this respect that will enure to the benefit of all the defendants.

The decree in this case is a decree for partition and proceeds upon a ground common to all the parties, namely, the convenience and inconvenience of each. The appeal also is directed against the whole decree. It is true that the portion of the decree which deals with the question of the incidence of the costs is severed so as to make each party of defendants liable for the costs allocated against it; but that does not prevent the application of Order XLI, rule 4 of the Civil Procedure Code. It has been held in the case of *Ram Kamal Shaha* v. *Ahmed Ali* (3) that it is not necessary for the application of section 544 (now Order XLI, rule 4) of the Civil Procedure Code that the decree should proceed on every ground common to all the plaintiffs or defendants; and it is quite sufficient if it proceeds on any ground common to the party to which the appellant belongs. We think, therefore, that there is no bar to the application of Order XLI, rule 4 of the Code; and, that being so, it is not necessary to invoke the aid of Order XLI, rule 33, which is couched in very wide terms and gives the Courts of Appeal very wide powers for the purpose of doing justice between the parties.

It has been further argued that the judgment does not order the apportionment of the costs of the suit, that the decree is not in accordance with the

(1) (1869) 12 W. R. 160. (2) (1907) I. L. R. 34 Calc. 878.
(3) (1903) I. L. R. 30 Calc. 429.

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judgment so far as these costs are concerned and that the decree is, therefore, amenable to amendment. This amendment might of course have been made by the first Court but that would result in a joint decree for the costs of the suit against all the defendants. Such a decree would offend against the principles of the cases of *Shama Soonduree Debia* v. *Jardine Skinner & Co.* (1) and *Dildar Ali Khan* v. *Bhawani Sahai Singh* (2). Under section 107 of the Code of Civil Procedure, we have the same power as the Court of first instance; and, in making the final determination in the case, we must pass a decree that is in conformity with law.

In this view of the question raised, we think that the order of the Court below as to the costs incurred before the preliminary decree should be set aside and each party directed to bear its own costs up to that point. The costs of the partition will be apportioned according to the shares of the parties. The success of the appellant being only partial, each party will bear its own costs in this appeal.

S. K. B.

(1) (1869) 12 W. R. 160.

(2) (1907) I. L. R. 34 Calc. 878.

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

MAHAMAYA DEBI

v.

HARIDAS HALDAR.*

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July 6.

Palas or turns of worship—Mortgage—Transferability of palas—Custom—Kalighat Temple—Estoppel of mortgagor, even if trustee—Essential attributes of valid custom—Public policy, contravention of—Onus probandi—Civil Procedure Code (Act V of 1908), O. XXXIV—Chattels—Intangible property, foreclosure of mortgage of—Pledge.

Per MOOKERJEE J. (BEACHCROFT J. reserving opinion). A mortgagor, even when acting in a public capacity and not for his own benefit, is estopped to deny his title, and cannot set up as a defence for himself against the mortgagee that the property so mortgaged is trust property which he had no right to mortgage.

Doe v. *Horne* (1) followed.

This principle is inapplicable where the mortgage is void as contrary to Statute.

Barrow's Case (2) followed.

Trustees for a public purpose are not, by the nature of their office, protected from the operation of estoppel as against the assignees of the original parties to the deed in question.

Doe v. *Horne* (1), *Webb* v. *Herne* (3) and *Higgs* v. *Assam Tea Co.* (4) referred to.

[View indicated by BANERJEE J. in *Mallika* v. *Ratanmani* (5) not accepted.]

Per MOOKERJEE and BEACHCROFT JJ. "A custom to be valid must have four essential attributes: (i) it must be immemorial; (ii) it must be

* Appeal from Appellate Decree, No. 1185 of 1911, against the decree of T. W. Richardson, District Judge of 24-Parganas, dated Feb. 3, 1911, modifying the decree of Pramatha Nath Chatterjee, Subordinate Judge of 24-Parganas, dated Aug. 16, 1910.

(1) (1842) L. R. 3 Q. B. 760; 61 R. R. 397.
(2) (1880) 14 Ch. D. 432, 441.
(3) (1870) L. R. 5 Q. B. 642.
(4) (1869) L. R. 4 Ex. 387.
(5) (1897) 1 C. W. N. 493.

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reasonable; (iii) it must have continued without interruption since its immemorial origin; and (iv) it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect".

Tyson v. *Smith* (1) followed.

A custom cannot be enlarged by parity of reasoning.

Arthur v. *Bokenham* (2), *Pradyote* v. *Gopi Krishna* (3) referred to.

"A custom originating within time of memory, even though existing in fact, is void at law."

Mayor of London v. *Cox* (4) followed.

Evidence showing exercise of a right in accordance with an alleged custom as far back as living testimony can go, raises the presumption, though only a rebuttable one, as to the immemorial existence of the custom.

Bastard v. *Smith* (5), *Mercer* v. *Denne* (6) followed.

If the existence of the custom has been proved for a long period, the *onus* lies on the person seeking to disprove the custom to demonstrate its impossibility.

If a custom be against reason (*i.e.*, artificial and legal reason warranted by authority of law) it has no force in law.

When a custom is said to be void as being unreasonable, the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence, and not from any rights conferred in ancient times

Salisbury v. *Gladstone* (7) followed.

The period for ascertaining, whether a particular custom is reasonable or not, is the time of its possible inception.

The Tanistry Case (8) followed.

In practice, the Kalighat Temple *palas* have been transferred during at least 90 years, though in a limited market which those alone can enter who are qualified to become shebait by birth or marriage, the time when this custom originated being unknown.

Proof of the existence of a custom need not be carried back by direct evidence to the year 1773 when the Supreme Court was established, or even to 1793 when the first Regulations were passed by the Indian Legislature.

(1) (1838) 9 Ad. & El. 406.
(2) (1708) 11 Mod. 148, 161.
(3) (1910) I. L. R. 37 Calc. 322, 326.
(4) (1867) L. R. 2 H. L. 239, 259.
(5) (1837) 2 Moo. & R. 129, 136.
(6) [1904] 2 Ch. 534, 556.
(7) (1861) 9 H. L. C. 692, 701.
(8) (1608) Davis 29, 32.

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The customary right to make a sale, mortgage, gift or lease of a *pala* in favour of persons within a limited circle (the transferee being under precisely the same obligation to the endowment as the transferor himself), is closely associated with and possibly developed out of the heritable, devisable, and partible character of a *pala*.

Janokee v. *Gopaul* (1) referred to.

A custom of this description clearly cannot be characterised on any rational grounds as unreasonable or opposed to public policy.

Foreclosure, as a remedy of the mortgagee, is not confined to mortgages of *land*; it is equally applicable to mortgages of *chattels*.

Harrison v. *Hart* (2) followed.

A mortgagee of *intangible* property is entitled to foreclose the mortgagor quite as much as a mortgagee of *chattels*.

SECOND appeal by Srimatee Mahamaya Debi, the plaintiff.

On the 16th August 1905, the defendant No. 1, Haridas Haldar, one of the Kalighat Temple shebaits, and his mother Srimatee Kumudini Debi, the defendant No. 2, executed in favour of the plaintiff Srimatee Mahamaya Debi a mortgage by way of conditional sale of three *palas* or turns of worship held by the mortgagors in the Temple of the Goddess Kali at Kalighat for Rs. 2,200 carrying interest at 6 per cent. This mortgage was in renewal of two previous conditional mortgages, dated 8th October 1900, and 9th December 1901, for Rs. 1,400 and Rs. 800, respectively. The mortgage money not having been repaid on 16th August 1908, the due date, the plaintiff, on the 13th September 1909, brought this suit in the Court of the Subordinate Judge, 24-Pergannas, to recover the sum and prayed for a foreclosure decree in default.

The plaintiff alleged in the plaint that the *palas* were transferable (according to immemorial custom) to a possible shebait, such as the plaintiff, entitled to take one or more *palas* by inheritance. The plaintiff

(1) (1877) I. L. R. 2 Calc. 365, 372. (2) (1726) 1 Comyn. 393; 2 Eq. Cas. Abr. 6.

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was the widow of one Jnanendra Nath Mookerjee, who was the son of the daughter's son of a member of the senior branch of the Haldar family, who are the hereditary shebaits of the Kalighat Temple. The husband of the plaintiff was also the son of a daughter of a Haldar, consequently the plaintiff's husband was descended from the Haldars on the paternal as well as the maternal side. Further, the sister of the defendant No. 1 had obtained a *pala* under the will of her father, and two of the *palas* in suit were acquired by the father of the mortgagor (the defendant No. 1) by purchase. Besides, there was an express declaration of the mortgagors in the fourth paragraph of the mortgage deed, that "no objection on their part or on behalf of their heirs or representatives shall be maintainable." The evidence proved that 83 *palas* out of 360 had changed hands permanently, the earliest transaction being a mortgage by way of conditional sale of a *pala* which was executed on the 4th October 1819, and was foreclosed in due course: and as early as 1840 the Court found that the custom of transfer was fully established. The plaintiff adduced overwhelming evidence that these transfers for the last 90 years had been confined to co-shebaits or to the members of families to whom a shebait could bestow his daughter in marriage, *i.e.*, those who were qualified to become shebaits by birth or marriage. The first defendant alone contested the suit on the grounds, *first*, that *palas* were not transferable by custom; and, *secondly*, that, even if the alleged custom was proved, no Court should recognise and enforce it, as it was unreasonable and opposed to public policy. On the 16th August 1910, Babu Pramatha Nath Chatterjee, Subordinate Judge, 24-Pergannas, decreed plaintiff's suit holding that *palas* were transferable by custom though in a limited market, and that the custom was

neither unreasonable nor opposed to public policy, and that the plaintiff was accordingly entitled to a foreclosure decree. On appeal, the District Judge of 24-Pergannas, on the 3rd February 1911, reversed this decision and gave the plaintiff a personal decree against the defendants, being of opinion that the custom of transferability of *palas* was opposed to public policy and unenforceable in a Court of justice.

Hence the plaintiff preferred a second appeal to the High Court.

Dr. Rashbehari Ghose (with him *Babu Mahendra Nath Roy*, *Babu Biraj Mohan Mozumdar*, *Babu Hari Bhusan Mookerjee*, *Babu Mohini Mohan Chatterjee* and *Babu Sarat Chandra Mookerjee*), for the appellant. I submit that the decision of the District Judge is wrong in law, on the following grounds:—*First*, the mortgagors are estopped to deny the validity of the mortgage on the ground that the property given by way of security was inalienable. As no man is allowed to dispute a title which he himself has granted, the mortgagor cannot set up against his mortgagee the title of a third person, even where the mortgagor is a trustee acting in a public capacity and not for his own benefit: see *Doe* v. *Horne* (1). *Secondly*, the custom of transferability of *palas* is reasonable, so that it may be recognised and enforced by a Court of justice. I do not dispute the proposition, that in the absence of a custom or usage to the contrary or any provision to that effect in the deed of endowment, a religious trust, or the right of management of a religious or charitable endowment, or a religious office attached to a temple cannot be alienated by the holder. Even assuming that a *pala* or turn of worship is not alienable except by custom, my

(1) (1842) L. R. 3 Q. B. 760 ; 61 R. R. 397.

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contention is that the custom which has been proved in this case should be recognised by the Court, as it satisfies all the requisites of a valid custom. Though the time when the custom in question originated is unknown, still it has been found to exist as far back as the evidence can be carried. I further submit, that as the plaintiff is entitled only to a foreclosure decree, this case is distinguishable from those cases where it has been laid down that *palas* or turns of worship cannot be sold at a public auction where persons professing other religious faiths, *e.g.*, Mahomedans and Christians, may bid for them. The case of *Lakshmanaswami* v. *Rangamma* (1) referred to by the District Judge is distinguishable, as the decree therein was one for *sale*: and the next case cited by him, *Ramanathan* v. *Murugappa* (2) has no bearing on the question. *Thirdly*, I submit that the plaintiff (mortgagee) is entitled to a foreclosure decree, in view of the nature of the property given by way of security; as this is a remedy of the mortgagee which is not confined to mortgages of land only, it is equally applicable to mortgages of chattels and intangible property.

Babu Atul Krishna Roy (with him *Mr. C. R. Das*), for the respondents. Though admitting the passing of consideration, and the execution of the mortgage deed, the respondents (mortgagors) are fighting on a question of principle, and I must contend that the *palas* of the Kalighat Temple are not transferable for the pecuniary benefit of the shebaits who are mere trustees of a public temple, the office of shebait being *extra commercium* inasmuch as it is a religious office stamped with a trust.

[MOOKERJEE J. Take the question of estoppel first.]

(1) (1902) I. L. R. 26 Mad. 31. (2) (1903) I. L. R. 27 Mad. 192.

It does not arise at all. A former abuse of trust cannot be pleaded against a trustee who seeks to prevent a repetition of that abuse, even if he were formerly implicated in the same indefensible course against which he is seeking to protect the trust property: *Juggut Mohini* v. *Sokheemoney* (1) and *Mallika* v. *Ratanmani* (2).

[MOOKERJEE J. What do you say as to the case of *Doe* v. *Horne* (3)?]

In that case the mortgagors were empowered to raise money on mortgage, while here the *palas* cannot be alienated.

There was no issue on estoppel; that question has been raised here for the first time.

Here the transfer is void under Statute, *i.e.*, Scripture of Hindu Law. For the principle against estoppel, see Bigelow p. 544, Ch. 17, s. 1.

Next, as regards the second contention of the appellant, I submit that the custom of transferring a *pala* or selling the office of a shebait even to a person of the same caste or sect can never be reasonable and valid: see *Kuppa* v. *Dorasami* (4), *Juggurnath* v. *Kishen* (5) and *Raja Vurmah* v. *Ravi Vurmah* (6).

To validate such a custom would tend to public mischief in inducing needy incumbents of hereditary religious offices who desire to sell them to give a dishonest recognition to qualifications, which in fact were not the qualifications demanded by the nature of the office. I submit that no custom can validate an act which is clearly against public policy. The offerings made by Hindus to a public shrine constitute a

(1) (1871) 14 Moo. I. A. 289; 17 W. R. 41, 44.
(2) (1897) 1 C. W. N. 493.
(3) (1842) 3 Q. B. D. 760, 766; 61 R R. 397.
(4) (1882) I. L. R. 6 Mad. 76.
(5) (1867) 7 W. R. 266.
(6) (1876) I. L. R. 1 Mad. 235; L. R. 4 I. A. 76.

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public trust, in which the trustee can never have any beneficiary interest, and any appropriation by them of the same would be a clear breach of trust; no custom recognising such appropriation can alter the character of such a transaction, or validate the same.

See *Rajeshwar* v. *Gopeshwar* (1), which lays down the rule that shebaits cannot bequeath their office by will to non-shebaits. See also *Mitta Kunth* v. *Neerunjun* (2). Even if the owners of private temples may alter the character of the trust to a certain extent by family arrangement, still the trustees of the Kalighat temple can never do so, because, as both the Courts below have found, it is a public temple.

[BEACHCROFT J. Then you have been abusing your trust, and you now want the Court to put you in a position to continue doing so.]

Further, the alleged custom of transferability of *palas* does not bear the requisite characteristics of a valid legal custom. For it is not certain, reasonable, immemorial, legal or moral. The earliest instance of transfer of a *pala* goes back only to 4th October 1819 or about 90 years before the institution of this suit; not even to the beginning of the establishment of regular Courts of Record in British India, while the foundation of this Trust is lost in the oblivion of mythical ages.

The transfer of *palas* is an abuse of trust, and by implication, mis-appropriation: *Raja Vurmah* v. *Ravi Vurmah* (3). For the personal debt of a shebait, trust property cannot be sold; *cf.* the position of the manager of an infant heir.

[MOOKERJEE J. There is great danger in developing superficial analogies.]

(1) (1907) I. L. R. 35 Calc. 226, 229. (2) (1874) 14 B. L. R. 166.
(3) (1867) 7 W. R. 266.

If this custom be upheld, extravagance among shebaits will be encouraged. Public policy must be vindicated, whether the plaintiff lose her money or not.

[MOOKERJEE J. But you have not got beyond extravagance encouraged by any possible decision of ours.]

Misappropriation does not alter the character of the trust. Even a *mourasi mokurari* lease of landed property granted to a co-shebait has been held to be void. Regarding the Baidyanath Temple case, is *pala* or turn of worship the same as *charao*? No custom was pleaded there: *Girijanund* v. *Sailajanund* (1).

[MOOKERJEE J. The contention of the other side is not that the Kalighat temple *palas* are transferable, as a matter of right under Hindu Law, but that they are so by custom.]

Even if such a custom is proved, it is bad in law: see *Mallika* v. *Ratanmani* (2).

Instances of continued abuse of trust for 90 years will not make the custom valid.

Kuppa v. *Doraswami* (3); custom was not pleaded there. See also Golap Ch. Sastri's Hindu Law, p. 486, 491.

The custom found by the District Judge to be in existence relates to private and not public endowments: *Janokee* v. *Gopaul* (4). See also K. K. Bhattacharyya on Hindu Law, p. 453. A turn of worship, cannot be called a share. [Mayne's Hindu Law paras. 437, 438.]

As to a foreclosure decree, I submit that a *pala* or turn of worship has been held in all the reported cases to be moveable property. As a foreclosure decree can only be made with respect to mortgages of immoveable property, the provisions of the Transfer of

(1) (1896) I. L. R. 23 Calc. 645.
(2) (1897) 1 C. W. N. 493.
(3) (1882) I. L. R. 6 Mad. 76.
(4) (1877) I. L. R. 2 Calc. 365.

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Property Act which refer to foreclosure of mortgages of immoveable property only, and Order 34 of the Civil Procedure Code of 1908 (applying also to mortgages of immoveable property) are inapplicable to mortgages of *palas*. There is no provision of Indian Law for granting a decree for foreclosure in the case of pledge, or mortgage of moveables.

Babu Mahendra Nath Roy, in reply. It has been urged, that we cannot have a foreclosure decree because a *pala* is not immoveable property. See Fisher on Mortgage, 6th Edition, Art. 985, p. 505. A pledge presupposes delivery of possession. (Contract Act, ss. 172, 148.)

For the difference between a pledge and a mortgage, I refer to pages 107 and 320 of Ghose's Mortgage. A pledgee can realise his money by sale of the pawn: *Harrold* v. *Plenty* (1). Regarding foreclosure of a mortgage of moveables, see Coote on Mortgages, 7th edition, Ch. 49, para 1, p. 1019.

[*Babu Atul Krishna Roy*. See Halsbury's Laws of England, Vol. I, p. 123. Section 58 of the Transfer of Property Act refers] to mortgages of immoveable property.]

Cur. adv. vult.

MOOKERJEE J. This is an appeal by the plaintiff in a suit for foreclosure of a mortgage by way of conditional sale, executed in her favour by the defendants on the 16th August 1905, in renewal of two previous conditional mortgages, dated the 8th October 1900 and 9th December 1901. The earlier mortgages had been granted to secure loans of Rs. 1,400 and 800, respectively. The mortgage now in suit was given to secure the sum of Rs. 2,200 which was to carry interest at the moderate rate of 6 per cent. per annum

(1) [1901] 2 Ch. 314.

and was made repayable on the 16th August 1908. The subject-matter of the security consisted of three *palas* or turns of worship held by the mortgagors in the temple of the goddess Kali at Kalighat. The mortgage money was not repaid on the due date, and the paintiff commenced this action on the 13th September 1909, to recover the sum with interest and costs. The plaintiff alleged in the plaint that the *palas* were transferable according to immemorial custom. The first defendant, who alone contested the claim, set up in his written statement the case that the *palas* were not transferable by custom, and that even if the alleged custom was proved, no Court should recognise and enforce it, as it was unreasonable and opposed to public policy. The Subordinate Judge held that the *palas* were transferable by custom in a limited market, that the custom was neither unreasonable nor opposed to public policy, and that the plaintiff was accordingly entitled to a foreclosure decree. On appeal, the District Judge has reversed this decision and has given the plaintiff, only a personal decree against the defendants, as in his opinion the custom of transferability of *palas* was opposed to public policy and unenforceable in a Court of Justice. On the present appeal by the plaintiff, three substantial grounds emerge for consideration, namely, *first*, are the mortgagors estopped to deny the validity of the mortgage on the ground that the property given by way of security was inalienable? *secondly*, is the custom of transferability of *palas* reasonable so that it may be recognised and enforced by a Court of Justice? and, *thirdly*, is the plaintiff entitled to a foreclosure decree, in view of the nature of the property given by way of security? Before I deal with these questions, it is necessary to define the custom which, the Courts below have concurrently

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found, does exist in respect of this particular religious foundation.

The Courts below have found that *palas* are ordinarily transferred by sale, mortgage, lease and gift, and that they are also the subject of partition and of testamentary devise. This is proved, not merely by oral evidence, but also by evidence of concrete instances in which such transactions have come before Courts and have been upheld as legal. One of the earliest transactions of which we find mention is a mortgage by way of conditional sale of a *pala*, which was executed on the 4th October 1819 and was foreclosed in due course. We have other instances of conditional mortgages, dated 11th April, 1831 and 29th June, 1831 which were both foreclosed in 1837. We have further a conditional mortgage of the 18th February, 1835, which was foreclosed on the 8th August, 1840, after contest in a suit in which the mortgagor unsuccessfully pleaded that the *pala* was non-transferable. A more modern instance is a conditional sale of 1864 which was foreclosed on the 16th December, 1867. Instances of sales of *palas*, specially in recent years, are quite numerous, and it is not disputed that two of the *palas* in suit were acquired by the father of the first defendant, mortgagor, by purchase. Instances have also been adduced in which *palas* have been sold in execution of decrees, have been leased out for longer or shorter periods, have been bequeathed like other property, and have, in fact, formed the subject of transfer in some form or other. One of the most recent instances on the record is a decree of this Court, dated 30th August, 1900, which directed possession to be delivered of a *pala* which had been mortgaged by way of conditional sale, followed by a decree for foreclosure. It has been conclusively proved that 83 *palas* out of 360 have changed hands permanently.

These facts amply justify the concurrent finding of the Courts below that the custom of transfer of *palas* of the Kalighat shrine has been established beyond the shadow of a doubt; the existence of the custom has been traced back almost to the time of the first establishment of British Courts in this country, and even as early as 1840, the Court found that the custom of transfer was fully established. The evidence, at the same time, establishes that these transfers have not been unrestricted, but have been confined to co-shebaits or to the members of families to whom a shebait can bestow his daughter in marriage; in other words, there is undisputed and overwhelming evidence, oral and documentary, that in practice *palas* have been transferred during at least 90 years, though in a limited market which those alone can enter who are qualified to become shebait by birth or marriage. Only one instance has been traced in which a transfer, in favour of an absolute stranger not connected with the hereditary shebaits by blood or marriage, has been recognised, but the transferee in that case was the hereditary pujari or priest whose function, it must be observed, is entirely distinct from that of a shebait. The plaintiff is the widow of one Jnanendra Nath Mookerjee who was the son of the daughter's son of a member of the senior branch of the family of Haldars who are the hereditary shebaits of the goddess Kali. The husband of the plaintiff was also the son of a daughter of a Haldar, in other words, the husband of the plaintiff was descended from the Haldars on the paternal as also on the maternal side. The plaintiff is, consequently, a possible shebait; in other words, the contingency might have happened which would have entitled the plaintiff to take one or more *palas* by inheritance. The plaintiff is plainly entitled to the benefit of the custom, and this conclusion does

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not in any way contravene the well-established rule that a custom cannot be enlarged by parity of reasoning: *Arthur* v. *Bokenham* (1), *Pradyote* v. *Gopi Krishna*(2). The plaintiff is conclusively proved to belong to a class of persons to whom *palas* have hitherto been transferred and the transfers have been recognised as valid. Consequently, if the validity of the custom is established, there is no conceivable reason why the plaintiff should not by foreclosure become entitled to the three *palas* in dispute.

As regards the *first* question, it has been argued on behalf of the mortgagee that as no man is allowed to dispute a title which he himself has granted, the mortgagor cannot set up against his mortgagee the title of a third person; this cannot be disputed: *Doe* v. *Pegge* (3), *Goodtitle* v. *Bailey* (4), *Doe* v. *Vickers* (5), *Doe* v. *Clifton* (6), *King* v. *Smith* (7), *Debendra Nath* v. *Mirza Abdul Samed* (8). The rule has been held applicable where the mortgagor is a trustee, acting in a public capacity and not for his own benefit [*Doe* v. *Horne* (9), notwithstanding the contrary dictum in *Fairtitle* v. *Gilbert* (10), *Doe* v. *Hares*(11)], and the principle has been repeatedly approved and applied in the Courts of the United States that a mortgagor is estopped to deny his title, and cannot set up as a defence for himself against the mortgagee that the property so mortgaged is trust property, which he has no right to mortgage: *Bush* v. *Marshall* (12), *Strong* v. *Waddell* (13), *Jones* v. *Reese* (14), *Farris* v.

(1) (1708) 11 Mod. 148, 161.
(2) (1910) I. L. R. 37 Calc. 322, 326
(3) (1785) 1 T. R. 758.
(4) (1777) 2 Cowper 597, 601.
(5) (1836) 4 A. & E. 782.
(6) (1836) 4 A. & E. 809, 813.
(7) [1900] 2 Ch. 425.
(8) (1909) 10 C. L. J. 150, 163.
(9) (1842) L. R. 3 Q. B. 760, 766; 61 R. R. 397.
(10) (1787) 2 T. R. 169, 171.
(11) (1833) 4 B. & Ad. 435, 440.
(12) (1848) 6 Howard 284.
(13) (1876) 56 Ala. 471.
(14) (1880) 65 Ala. 134.

Houston (1), *Boisclair* v. *Jones* (2), *Usina* v. *Wilder*(3), *McLeon* v. *Smith* (4). The reason for the rule is concisely put by Collier C. J. in *Stewart* v. *Anderson*, (5): "by the mortgage, the mortgagor professes to convey, and thus declares that he has an interest co-extensive with what he undertakes to transfer; and he will not be heard to say, in contradiction of his own deed, or in opposition to a claim founded thereon, that he was guilty of a falsehood and had no estate or interest therein". This principle has been held inapplicable where the mortgage is void as contrary to Statute [*Brewster* v. *Madden* (6)], on the ground that "it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament": *Barrow's case*, (7). Hence, it has been ruled that a corporation is not estopped from pleading that a mortgage made by it is *ultra vires*: *Ex parte Watson* (8). See also *Fairtitle* v. *Gilbert* (9), *Blackburn* v. *Cunliffe* (10), *British M. B. Co.* v. *Charnwood, F. R. Co.* (11). But the view has been steadily maintained that trustees for a public purpose are not, by the nature of their office, protected from the operation of estoppel as against the assignees of the original parties to the deed in question: *Doe* v. *Horne* (12), *Webb* v. *Herne* (13), *Higgs* v. *Assam Tea Co.*(14). I am not prepared to accept the view indicated by Banerjee, J., in *Mallika* v. *Ratanmani* (15), which receives no support from the decision of the Judicial

(1) (1883) 74 Ala. 162.
(2) (1867) 36 Ga. 499.
(3) (1877) 58 Ga. 178.
(4) (1880) 49 Wis. 200.
(5) (1846) 10 Ala. 504, 508.
(6) (1875) 15 Kans. 249.
(7) (1880) 14 Ch. D. 432, 441.
(8) (1888) 21 Q. B. D. 301, 302.
(9) (1787) 2 T. R. 169, 171
(10) (1885) 29 Ch. D. 902.
(11) (1887) 18 Q. B. D. 714, 719.
(12) (1842) 3 Q. B. D. 760, 766; 61 R. R. 397.
(13) (1870) 5 Q. B. D. 642.
(14) (1869) L. R. 4 Ex. 387.
(15) (1897) 1 C. W. N. 493.

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Committee in *Juggat Mohini* v. *Sokheemoney* (1), cited in support of this position; but there are cases where trustees have been allowed to impeach their own grants: *Rumonee* v. *Baluck* (2), and conflicting dicta are to be found in *Gulam Nabi* v. *Nagammal* (3), and *Gulzar* v. *Fida* (4). [See *Sidhu Sahu* v. *Gopi Charan* (5) where the earlier cases are discussed.] I am of opinion that in the case before us, the Court should not depart from the ordinary rule that the mortgagor cannot dispute the title of the mortgagee, specially in view of the express declaration of the mortgagors in the fourth paragraph of the mortgage deed that "no objection on their part or on behalf of their heirs or representatives shall be maintainable." But I do not desire to rest the decision solely on the ground of estoppel, for, as will presently be seen, there is no substance in the objection raised by the mortgagors.

As regards the *second* question, it has not been disputed on behalf of the mortgagee that in the absence of a custom or usage to the contrary or any term to that effect in the deed of endowment, a religious trust or the right of management of a religious or charitable endowment or a religious office attached to a temple or any other endowment cannot be alienated by the holder: *Raja Vurmah* v. *Ravi Vurmah* (6), *Rama Varma* v. *Rama Nayar* (7), *Kannan* v. *Nila Kandan* (8), *Lakshmanaswami* v. *Rangamma* (9), *Gnanasambandha* v. *Velu Pandaram* (10), *Sarkum* v. *Rahaman* (11), *Narayana* v.

(1) (1871) 14 Moo. I. A. 289; 10 B. L. R. 19; 17 W. R. 41.
(2) (1870) 14 W. R. 101.
(3) (1896) 6 Mad. L. J. 270.
(4) (1883) I. L. R. 6 All. 24.
(5) (1912) 17 C. L. J. 233, 237.
(6) (1876) I. L. R. 1 Mad. 235; L. R. 4 I. A. 76.
(7) (1882) I. L. R. 5 Mad. 89.
(8) (1884) I. L. R. 7 Mad. 337.
(9) (1902) I. L. R. 26 Mad. 31.
(10) (1899) I. L. R. 23 Mad. 271; L. R. 27 I. A. 69.
(11) (1896) I. L. R. 24 Calc. 83.

Ranga (1), *Subharayudu* v. *Kotayya* (2), *Alagappa* v. *Sivaramasundara* (3), *Rajeshwar* v. *Gopeshwar* (4), *Durga* v. *Chanchal* (5), *Rup Narain* v. *Junko* (6), *Mallika* v. *Ratanmani* (7), *Rangasami* v. *Ranga* (8), *Rajaram* v. *Ganesh* (9), *Ukoor* v. *Chunder* (10), *Juggurnath* v. *Kishen* (11), *Kali Charan* v. *Bangshi* (12), *Dubo* v. *Srinibas* (13), *Ramanathan* v. *Murugappa* (14), *Trimbak* v. *Lakshman* (15), *Kuppa* v. *Dorasami* (16). There is also authority for the proposition that alienation of a religious office may be validly made in favour of a person standing in the line of succession and not disqualified by personal unfitness, *Sitarambhat* v. *Sitaram* (17), *Mancharam* v. *Pranshankar* (18), *Annasami* v. *Ramakrishna* (19), *Nirad Mohini* v. *Shibdass* (20). But the appellant does not invite us to go even as far as this proposition. She asks us to assume that a *pala* or turn of worship is not alienable, except by custom, and contends that the custom which has been proved in this case should be recognised by the Court: *Raja Vurmah* v. *Ravi Vurmah* (21), *Gnanasamandha* v. *Velu Pandaram* (22). This raises the question, whether the custom possesses the characteristics deemed essential for the validity of a custom. These essential attributes were specified by

(1) (1891) I. L. R. 15 Mad. 183.
(2) (1892) I. L. R. 15 Mad. 389.
(3) (1894) I. L. R. 19 Mad. 211.
(4) (1907) I. L. R. 34 Calc. 828 ; I. L. R. 35 Calc. 226.
(5) (1881) I. L. R. 4 All. 81.
(6) (1878) 3 C. L. R. 112.
(7) (1897) 1 C. W. N. 493.
(8) (1892) I. L. R. 16 Mad. 146.
(9) (1898) I. L. R. 23 Bom. 131.
(10) (1865) 3 W. R. 152.
(11) (1867) 7 W. R. 266.
(12) (1871) 6 B. L. R. 727 ; 15 W. R. 339.
(13) (1870) 5 B. L. R. 617.
(14) (1903) I. L. R. 27 Mad 192.
(15) (1895) I. L. R. 20. Bom. 495.
(16) (1882) I. L. R. 6 Mad. 76.
(17) (1869) 6 Bom. H. C. R. 250.
(18) (1882) I. L. R. 6 Bom. 298.
(19) (1900) I. L. R. 24 Mad. 219.
(20) (1909) I. L. R. 36 Calc. 975.
(21) (1876) I. L. R. 1 Mad. 235 ; L. R. 4 I. A. 76.
(22) (1899) I. L. R. 23 Mad. 271 ; L. R. 27 I. A. 69.

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Tindal C. J., in *Tyson* v. *Smith* (1), in these terms; "A custom to be valid must have four essential attributes: *first*, it must be immemorial; *secondly*, it must be reasonable; *thirdly*, it must have continued without interruption since its immemorial origin; and *fourthly*, it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect." See also *Hurpurshad* v. *Sheo* (2), *Raja Vurmah* v. *Ravi Vurmah* (3), *Lutchmeeput* v. *Sadaulla* (4), *Ghasiti* v. *Umrao* (5). In the case before us, the custom obviously satisfies the first, third and fourth requirements. The time when the custom originated is unknown; all that has been ascertained is that, as far as the evidence can be carried back, it has been in existence. This takes the case out of the rule formulated by Willes J., in *Mayor of London* v. *Cox* (6) that "a custom originating within time of memory, even though existing in fact, is void at law." There is no force in the contention that the proof of the existence of the custom should have been carried back by direct evidence to 1793 when the first Regulations were passed by the Indian Legislature, if not to the year 1773, when the Supreme Court was established. It is well settled, that evidence showing exercise of a right in accordance with an alleged custom as far back as living testimony can go, raises the presumption, though only a rebuttable presumption, as to the immemorial existence of the custom. As Tindal, C.J., said in *Bastard* v. *Smith* (7), you cannot reasonably expect to have it proved that the custom did in fact exist before time of legal memory; but you

(1) (1838) 9 Ad. & El. 406.
(2) (1876) L. R. 3 I. A. 259.
(3) (1876) I. L. R. 1 Mad. 235; L. R. 4 I. A. 76.
(4) (1882) I. L. R. 9 Calc. 698.
(5) (1893) I. L. R. 21 Calc. 149.
(6) (1867) L. R. 2. H. L. 239, 258.
(7) (1837) 2 Moo. & R. 129, 136.

are to require proof, as far back as living memory goes, of a continuous, peaceable and uninterrupted use of the custom. To the same effect is the observation of Farwell, J., in *Mercer* v. *Denne* (1): "not only ought the Court to be slow to draw an inference of fact which would defeat a right that has been exercised during so long a period as the present, unless such inference is irresistible, but it ought to presume everything possible to presume in favour of such a right." It is interesting to note that Vijnaneswara in his Mitakshara enunciated a similar rule (Yajnavalkya, Book II, 27). On the authority of a text of Katyayana, he holds that "time within the memory of man extends as far as a hundred years", as a man has, according to Sruti, a hundred years' duration of life. (Mitakshara, trans., Gharpure, p. 50). Apararka, in his commentary on the same text of Yajnavalkya, treats a period beyond three generations (that is one hundred and five years) as time immemorial, and, refers to an earlier text to show that a period beyond sixty years might be treated as time beyond human memory. In any event, it is well settled that if the existence of the custom has been proved for a long period, the *onus* lies on the person seeking to disprove the custom, to demonstrate its impossibility; in this case, the mortgagors have entirely failed to meet the evidence of the custom adduced by the plaintiff. There is also no room for serious controversy as regards the certainty and continuity of the custom. The only question, consequently, for consideration is, whether it is reasonable as the appellant contends or unreasonable and opposed to public policy as the respondent asserts. It is indisputable that if a custom be against reason, it has no force in law; but as explained in Co. Litt., 62*a*, the reason here referred to is not to be understood as meaning every

(1) [1904] 2 Ch. 534, 556.

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unlearned man's reason, but artificial and legal reason warranted by authority of law; or, as Blackstone puts it, (Commentaries, Vol. I, p. 77) it is sufficient if no good legal reason can be assigned against it. When, however, it is said that a custom is void, because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient times, *Salisbury* v. *Gladstone* (1). It is also well settled that the period for ascertaining, whether a particular custom is reasonable or not, is the time of its possible inception; this is in accord with the observation in the *Tanistry Case* (2): "the commencement of a custom (for every custom hath a commencement, although the memory of man doth not extend to it, as the river Nile hath a spring although geographers cannot find it) ought to be upon reasonable ground and cause, for if it was unreasonable in the original, no usage or continuance can make it good: *Quod ab initio non valuit tractu temporis non convalescet.*" When tested in the light of these principles, no good ground can be assigned why the custom should be condemned as unreasonable. There is no force in the contention of the respondents that because the custom contravenes the rule that a religious office is inalienable, it must be pronounced to be against public policy; if this argument were to prevail, all customs would be unreasonable. Since customs in general involve some inconsistency with the general common law of the realm or are contrary to a particular maxim, the fact of this inconsistency is not of itself a ground for holding the custom unreasonable

(1) (1861) 9 H. L. C. 691, 700, 701. (2) (1608) Davis 29, 32.

and bad: *Tyson* v. *Smith*(1). Thus in the *Tanistry Case* (2), it is said that "several customs which had been adjudged void in our books as being unreasonable against common right or purely against law, if their nature and quality be considered, will be found injurious to the multitude and prejudicial to the Commonwealth." To the same effect is Co. Litt. 113*a*; "*Consuetudo ex certa causa rationabili usitata privat communem legem.*" Is there then anything to show that the custom is injurious to the endowment or to the Commonwealth? One of the mortgagors has a turn of worship or *pala*; he is entitled in this character to collect the offerings made to the goddess on the day on which his turn falls; he applies a portion of the income for the worship of the goddess and appropriates the remainder for his personal use. It is not material to consider whether he should not apply the whole of the income for religious and charitable purposes; but let us assume that he and every shebait like him who has a *pala* may be compelled to do so. He transfers his turn of worship to a person who, in certain contingencies, might in his own right, have been a shebait and might, have held a *pala*. The transferee, as holder of the *pala*, is under precisely the same obligation to the endowment as the transferor himself. It is difficult to appreciate how a custom which recognises and validates a transfer to members of a limited circle under these cirumstances can be detrimental to the endowment or to the public. There is no question that a *pala* of the Kalighat temple is heritable, and it is immaterial whether the heir is a male or female; the custom in this respect is established beyond doubt: *Janokee* v. *Gopaul* (3). There is also no

(1) (1838) 9 A. & E. 406, 422. (2) (1608) Davis 29, 33.
(3) (1877) I. L R. 2 Calc. 365, 372.

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question that though probably religious offices were originally indivisible, they are now deemed partible: *Trimbak* v. *Lakshman* (1), *Mitta Kunth* v. *Neeranjun* (2), *Elder Widow* v. *Younger Widow* (3), *Sethuramaswamiar* v. *Meruswamiar* (4), *Damodardas* v. *Uttamram* (5), *Nagiah* v. *Muthacharry* (6), *Limba* v. *Rama* (7), *Raman* v. *Gopal* (8), *Rajeshwar* v. *Gopeshwar* (9), *Anund* v. *Boykantnath* (10), *Ram* v. *Taruck* (11), *Debendro* v. *Odit* (12), *Eshan Chunder* v. *Monmohini* (13), *Goopee* v. *Thakoordas* (14). Indeed, the very name *pala* or turn of worship shows that the right is partible. This involves, by necessary implication, the attribute of transferability as amongst the members of the family of shebaits; partition signifies the surrender of a portion of joint right in exchange for a similar right from the co-owner. There is further no question that a *pala* has not only been deemed heritable and partible; it has also been treated as devisable, as is illustrated by the case of the sister of the first defendant, who obtained a *pala* under the testamentary devise of her father. This, again, involves the recognition of the transferable character of a *pala*; the exercise of the right to make a bequest implies an assertion of the right to make a transfer *inter vivos*. It follows, consequently, that the customary right to make a sale, mortgage, gift or lease of a *pala* in favour of persons within a limited circle is closely associated with and possibly developed out of the heritable, devisable, and partible character of a *pala*.

(1) (1895) I. L. R. 20 Bom. 495.
(2) (1874) 14 B. L. R. 166; 22 W. R. 437.
(3) (1807) 1 Mac. Sel. Rep. 180.
(4) (1909) I. L. R. 34 Mad. 470.
(5) (1892) I. L. R. 17 Bom. 271.
(6) (1900) 11 Mad. L. J. 215, 222.
(7) (1888) I. L. R. 13 Bom. 548.
(8) (1897) I. L. R. 19 All. 428.
(9) (1907) I. L. R. 34 Calc. 828.
(10) (1867) 8 W. R. 193.
(11) (1872) 19 W. R. 28.
(12) (1878) I. L. R. 3 Calc. 390.
(13) (1878) I. L. R. 4 Calc. 683.
(14) (1882) I. L. R. 8 Calc. 807.

A custom of this description clearly cannot be characterised on any rational ground as unreasonable or opposed to public policy. It is further worthy of note that this is not a novel view of the true character of such a custom; for, as early as 8th August 1840, the validity of a conditional mortgage of a *pala* effected on the 18th February, 1835, was upheld in a contested litigation. Since every custom sanctioned by the Courts must be reasonable, it follows that every case where a custom has been upheld by the Courts is an example of a reasonable custom. When the evidence is examined from this point of view, the case for the mortgagee is materially strengthened; for, as is clear from the record, not only the existence but also the validity of the custom has been repeatedly recognised by the Courts during at least 70 years prior to the institution of this suit, while no single instance has been found where its reasonableness has been successfully assailed. The custom of transferability of a *pala* in favour of a limited circle of transferees must accordingly be held valid, and no good reason has been assigned why it should be deemed unreasonable or opposed to public policy.

As regards the *third* question, it has been argued on behalf of the mortgagors respondents that as Order 34 of the Civil Procedure Code of 1908 applies only to mortgages of immoveable property, the plaintiff is not entitled to a decree for foreclosure; and in this connection, reference has been made to *Eshan Chunder* v. *Monmohini* (1), and *Jati Kar* v. *Mukunda Deb* (2), to show that a *pala* or turn of worship is not immoveable property. There is no substance in this contention. It is well settled that foreclosure is a remedy of the mortgagee which is not confined to mortgages of land; it is equally applicable to mortgages of

(1) (1878) I. L. R. 4 Calc. 683. (2) (1911) I. L. R. 39 Calc. 227.

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chattels, as decided by the House of Lords in *Harrison* v. *Hart* (1), *Tancred* v. *Potts* (2), *Kemp* v. *Westbrook* (3). The case before us is clearly not that of a pledge of a moveable; such a pledgee, as pointed out in *Harrold* v. *Plenty* (4), is in a very different position from an ordinary mortgagee, as he has only a special property in the thing pledged and may obtain a sale but not a foreclosure. The plaintiff is a mortgagee, not of immoveable but of intangible property, and he is entitled to foreclose the mortgagor quite as much as a mortgagee of chattels. [Jones on Chattel Mortgages, 1908, sections 699 and 776.] It is worthy of note that, as early as 1181, Glanville described in detail a remedy applicable to chattel mortgages which is substantially equivalent to the modern procedure for foreclosure and order absolute on failure of the mortgagor to redeem within the period fixed by the Court [Glanville, Tr. Beames, Book X, Ch. 6-8; Ed. Beale, 1900, pages 204-210]. It may be added that if the contention of the mortgagors were to prevail, they might find themselves in a worse position than what they would occupy under a foreclosure decree; for, if the procedure for foreclosure, with its consequent opportunity to the mortgagor to redeem, is not applicable, the mortgagee may very well contend that the contract between the parties must be strictly enforced and that, as the time for repayment has passed away, the title of the mortgagee to the mortgaged property has become absolute; such a result could hardly have been contemplated by the mortgagors.

The result is that this appeal is allowed and the decree of the District Judge discharged. On account

(1) (1726) 1 Comyn. 393; 2 Eq. Cas. Abr. 6.
(2) Fonblanque on Equity, 5th Ed., 261n.
(3) (1749) 1 Ves. Sen. 278.
(4) [1901] 2 Ch. 314.

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taken of the sum due on the conditional mortgage in suit on the 16th November next, it transpires that the mortgagee will be entitled to Rs. 3,421 for principal and interest up to that date. The decree will direct that if the defendants pay this sum, together with costs of all the Courts with interest thereon (as specified in the decree of this Court) on or before the 16th November 1914, the mortgage will stand redeemed. On default, the mortgage will be foreclosed after the decree absolute has been made by the Primary Court in due course. The hearing fee in this Court is assessed at thirty gold mohurs.

BEACHCROFT J. I agree with the proposed order on the second ground discussed by my learned brother. On the question of estoppel, I prefer to reserve my opinion.

G. S. *Appeal allowed.*

APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

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July 6.

MANORAMA CHOWDHURANI

v.

SHIVA SUNDARI MOZUMDAR.*

Probate—Revocation—Will, validity of—Proof in common form—Knowledge —Acquiescence—Delay—Probate and Administration Act (V of 1881) s. 50.

It does not matter by what facts knowledge of the grant of probate and acquiescence in it are established, for neither knowledge, nor acquiescence, nor lapse of time are of themselves operative as a bar to the proceeding which every person interested in the estate of the testator has a right to bring, if he was not made a party in the probate proceeding. His application must be *bonâ fide* and he must give some reasonable and true explanation of the delay.

Hoffman v. *Norris* (1), *Merryweather* v. *Turner* (2) and *Kunja Lal Chowdhury* v. *Kailash Chandra Chowdhury* (3) referred to.

APPEAL by Srimatee Manorama Chowdhurani, the petitioner.

This was an application under section 50 of the Probate and Administration Act, 1881, to set aside a probate and to call on the probate-holders to prove the will in solemn form. There were two brothers, Gobinda Chandra Das Mozumdar and Banga Chandra Das Mozumdar, who lived together in common mess. Banga, the younger brother, predeceased Gobinda, leaving as his heirs his wife and two minor sons, Sasi and Kamini, born respectively in 1872 and

* Appeal from Original Decree, No. 270 of 1911, against the decree of A. H. Cuming, District Judge of Noakhali, dated May 15, 1911.

(1) (1805) 2 Phillim. 230. (2) (1844) 3 Curt. 802.

(3) (1910) 14 C. W. N. 1068.

1883. On the 27th or 28th December 1883, Gobinda Chandra died in a boat from cholera, after having executed a will on the 27th December 1883. He left him surviving a widow, Shiva Sundari, and five unmarried minor daughters. Thereafter, Shiva Sundari and her sister-in-law with their children continued to live together in joint mess. The testator's eldest daughter, Kusum Kumari, was born in 1869, his second daughter, Kumudini, in 1871, his third daughter, Manorama, who was the petitioner in this case, in 1876, his fourth daughter, Kadambini, in 1880 and his fifth daughter, Swarnalata, some time before the testator's death. Under the terms of the will, the widow got a life-estate with remainder to the brother's sons, and the daughters were given an allowance of Rs. 12 a year each for maintenance. Of these daughters, the youngest was dead. Manorama was married and had male issue and the other three were childless widows. On the 20th March, 1884, Shiva Sundari took out probate of her deceased husband's will, alleging in her petition that she was the executrix and legatee of the will and praying for grant of probate of the will or, in the alternative, for letters of administration to the estate of the deceased. In 1886, her confidential servant and manager, one Kali Kanta Biswas, filed this will in a rent suit, and it was subsequently returned to him. In 1887, Manorama was married, and at the time of her marriage her father's will was read out to her husband and to herself. Various receipts for the allowance of Rs. 12 for maintenance in terms of the testator's will were granted for different periods by Kusum Kumari, Kumudini and Kadambini, and the petitioner herself in 1901 gave a receipt for Rs. 200, being arrears of her maintenance for sixteen years and nine months, from 1885 to 1901. In 1909, Sasi and Kamini brought a suit for

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account against Kali Kanta Biswas, who was managing affairs for Shiva Sundari and their mother, and they made Shiva Sundari a defendant in that suit. Thereupon, Shiva Sundari separated from her sister-in-law and Sasi and Kumari went over to the side of the petitioner and her husband. In 1910, the petitioner filed the present petition alleging, *inter alia*, that the will was forged and that probate was fraudulently obtained by her mother, Shiva Sundari, without the issue of citations and the appointment of any guardian *ad litem* of the minors interested in the inheritance under the will, and made Shiva Sundari alone a party. Upon this Sasi and Kamini filed their objections, stating that the petition was fraudulent and collusive and got up by Shiva Sundari, and that the petitioner was precluded by acquiescence and delay from praying for revocation of the probate. The District Judge dismissed the case. Thereupon, the petitioner appealed to the High Court.

Babu Dwarkanath Chuckerburty and *Babu Ramesh Chandra Sen*, for the appellant. By the will the testator's daughters were practically disinherited and probate must be revoked. The first objection to the probate was that the testator's widow was not appointed executrix under the will, either expressly or by necessary implication, and her allegation in her application for probate, that she was appointed executrix, was an untrue allegation of a fact necessary in law to justify the grant of probate and not merely a technical defect. Then again, the will was a forgery and probate had been granted *ex parte* without the issue of citations on the petitioner or on any of her sisters, who were all minors at the time and on whose behalf no guardian *ad litem* had been appointed to represent them in the probate proceeding. There was a

sufficient *primâ facie* case to justify an enquiry and the petitioner was entitled to call upon the probate holder to prove the will in solemn form: see *Walter Rebells* v. *Maria Rebells* (1), *Brinda Chowdhrain* v. *Radhica Chowdhrain* (2), *Shoroshibala Debi* v. *Anandamoyee Debi* (3) and *Elokeshi Dassi* v. *Hurry Prosad Soor* (4). Neither delay, nor acquiescence, nor even receipt of legacy would preclude the next of kin from calling upon the executrix to prove the will in solemn form: see *Merryweather* v. *Turner* (5), *Bell* v. *Armstrong* (6) and *Core* v. *Spencer* cited therein (7), and *In re Sarah Topping* (8). The cases of *Kunja Lall Chowdhury* v. *Kailash Chandra Chowdhury* (9) and *Hoffman* v. *Norris* (10) were not applicable. In those cases there was some collateral litigation in other Courts, to which the petitioner had been a party and the petitioner was in consequence aware of, or had acquiesced in, the grant of probate. In the present case the circumstances were different. There was an intermediate life interest of the petitioner's mother, who was still alive, and the petitioner's right had not accrued, and no question of delay could arise. Morover, most of the attesting witnesses were alive and there would be no difficulty in establishing the will.

Mr. Caspersz (with him *Mr. Anis Yusuff* and *Babu Upendra Kumar Roy*), for the respondents, relied on the following cases: *Kali Das Chuckerbutty* v. *Ishan Chander Chuckerbutty* (11) *Koster* v. *Sapte* (12) *Blake* v. *Knight* (13) *Kunja Lal Chowdhury*

(1) (1897) 2 C. W. N. 100.
(2) (1885) I. L. R. 11 Calc. 492.
(3) (1906) 12 C. W. N. 6.
(4) (1903) 7 C. W N. 450.
(5) (1844) 3 Curt. 802.
(6) (1822) 1 Addam 365.
(7) (1796) 1 Addam 374.
(8) (1853) 2 Rob. Ecc. 620.
(9) (1910) 14 C. W. N. 1068.
(10) (1805) 2 Phillim. 230.
(11) (1904) I. L. R. 31 Calc. 914; 9 C. W. N. 49.
(12) (1838) 1 Curt. 691.
(13) (1843) 3 Curt. 547.

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v. *Kailash Chandra Chowdhury* (1) and *Nalini Sundari Gupta* v. *Bijoy Kumar Roy Chowdhury* (2). Much shorter delay than that in the present case has been held to disentitle a petitioner to revocation of probate. Where such an application was made, especially after long lapse of time, the Court had the right to ask the petitioner to be perfectly candid and would refuse the application unless weighty reasons were shown for the revocation. The following cases also were referred to: *Merryweather* v. *Turner* (3) *Hoffman* v. *Norris*(4) and *Musammat Jagrani Koer* v. *Kuar Durga Parshad*(5).

Babu Ramesh Chandra Sen, in reply. In *Kali Das Chuckerbutty* v. *Ishan Chandra Chuckerbutty*(6) the Privy Council did not refuse revocation on the ground of delay and in *Nalini Sundari Gupta* v. *Bijoy Kumar Roy Chowdhury*(7) this Court did not decide anything, the case being remanded for further evidence. This was not a suit in equity, the decree in which would be binding only on the parties. The judgment of the Probate Court was a judgment *in rem* binding on the whole world and Courts were very vigilant in seeing that probate of a forged will was not granted. In such a case as the present the laches of a party were immaterial. Moreover, the petitioner had never by any act or omission led any Court at any time to declare in favour of the will. There was, therefore, nothing to disentitle her to apply for revocation of the grant.

Cur. adv. vult.

(1) (1910) 14 C. W. N. 1068.
(2) (1911) 11 Ind. Cas. 277.
(3) (1844) 3 Curt. 802.
(4) (1805) 2 Phillim. 230.
(5) (1913) 18 C. W. N. 521; 19 C. L. J. 165.
(6) (1904) I.L.R. 31 Calc. 914; 9 C. W. N. 49.
(7) (1911) 11 Ind. Cas. 277.

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HOLMWOOD AND CHAPMAN JJ. This was a suit for revocation of probate of the will of one Gobinda Chandra Das Mozumdar calling upon the executor to prove the will in the presence of the petitioner.

The testator died on the 27th or 28th December 1883 of cholera in a boat and the will was said to have been executed on the 27th December 1883. He left a widow and five minor daughters unmarried as well as two brother's sons, the objectors in this case, who were then also minors. By the will the widow got a life estate with remainder to the brother's sons, and the daughters were given allowance for maintenance of Rs. 12 a year each. The petitioner, Manorama Chowdhurani, is the only one of the daughters who has borne sons, and she claims to come in because admittedly although general citations were issued and her mother obtained probate of the will, no separate guardian *ad litem* was appointed to represent the minor daughters or the minor brother's sons in the probate proceeding. The eldest daughter, Kusum Kumari now a childless widow, was born about 1869; the younger brother's son, Sasi Mohan Das Mozumdar, was born in 1872; the 2nd daughter, Kumudini, was born in 1871; the petitioner was born in 1876; the fourth daughter, Kadambini, was born in 1880, and the younger brother's son, Kamini Mohan Mozumdar, was born in 1883. The fifth daughter is dead.

It is fully established by evidence that Shiva Sundari, the widow of the testator, took out the probate on the 20th March 1884, and in a rent suit in 1886 the will was filed by her confidential servant, Kali Kanta Biswas, and returned to him. In 1887 the petitioner then 11 years of age was married, and there is evidence that the will was read out to her husband, a pleader's clerk, who has since become a vernacular copyist in the Munsif's Court at Lakhipur and herself at the

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time of the marriage. In accordance with the terms of the will, Kusum Kumari one of the daughters gave receipts for her allowance to her mother in 1887 and to her mother and Khuri the mother of the objectors jointly for the years 1888 and 1891. Two subsequent receipts of hers, the first given to her mother and Sasi Mohan jointly and the second to her mother alone, have also been produced. Receipts of a similar nature granted by Kumudini for 1890 and 1901 are produced and from Kadambini for 1903. But the most important document is the receipt given by the petitioner herself in 1901 for Rs. 200, being the arrears of her maintenance for 16 years from 1885 to 1900 and three quarters of her allowance of 1901. All these receipts clearly recite that her father Gobinda before his death executed a will on the 13th Pous 1290 and in the said will he made directions for payment of Rs. 12 annually to the recipient as allowance out of the profits of the estate. In 1909 the objectors, Sasi Mohan and Kamini Mohan, had occasion to bring a suit for accounts aganist Kali Kanth Biswas who was managing for Shiva Sundari and for their own mother and they made Shiva Sundari a defendant also. This appears to have annoyed Shiva Sundari who separated from her sister-in-law and the objectors and went over to the side of the petitioner and her husband and in 1910 this petition was brought making Shiva Sundari alone a party. Upon this the objectors came in and said that the petition was fraudulent and collusive and got up by Shiva Sundari. At the trial Shiva Sundari and all the surviving daughters denied the will altogether and denied they had received any allowance and supported the petitioner in her allegation that she had no knowledge of the will of her father or of the probate case until Kartic 1316 when she went to visit her father's house.

As regards the facts, we may at once say that we have carefully perused the documents and can have no doubt that the receipt Ex. A is in the handwriting of the petitioner herself, and the other receipts are genuine. Numerous specimens of the handwriting of the ladies have been produced in the shape of affectionate letters and post-cards written by them to the objectors and to their own mother, the authenticity of which cannot for one moment be doubted, though the witnesses of the petitioner have had the audacity to deny all knowledge of them. It is clear from the correspondence that up till 1909 the sisters were on the most affectionate terms with their cousins, the objectors. One of the letters speaks of the objectors as the only hope of carrying on their father's name.

We, therefore, find two main facts against the petitioner: *first*, that her petition is not *bonâ fide* but collusive and fraudulent, made solely as an answer to the suit for accounts against their mother and her agent; and, *secondly*, that no resonable account is given of the circumstances which entitled the petitioner to reopen the probate after so many years. The account she does give is entirely false, and as Shiva Sundari herself undoubtedly obtained the probate and they knew of it and acquiesced in it for many years they must on the authorities give some good and true reason why they had not proceeded earlier. This doctrine is clearly laid down in *Hoffman* v. *Norris* (1) which was cited with approval in *Merryweather* v. *Turner* (2) where it was stated that the ground or principle upon which the Court proceeded in *Hoffman* v. *Norris* (1) was that the petitioner was not barred by lapse of time, if he can show good reason why he did not proceed at the

(1) (1805) 2 Phillim. 230. (2) (1844) 3 Curt. 802, 813.

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earlier period; but if he does not show good cause the Probate Court will not allow him to call in the will after such a lapse of time. The same view has been taken by this Court in *Kunja Lal Chowdhury* v. *Kailash Chandra Chowdhury* (1).

It is urged that in all these cases there had been collateral litigation in other Courts to which the petitioner had been a party and was thereby saddled with knowledge and acquiescence. But it does not seem to us to matter by what facts such knowledge and acquiescence are established, for neither knowledge, nor acquiescence, nor lapse of time, are of themselves operative as a bar to the proceeding which every person interested in the estate of the testator has a right to bring if they were not made parties in the probate proceeding. What is held is that where knowledge, acquiescence and lapse of time are shown, the petitioner must give some reasonable and true explanation of the delay; or, in other words, the application must be made *bonâ fide*.

We are of opinion, apart from all authority, that our finding that this petition is a dishonest and vindictive proceeding supported by false evidence and not putting the true facts at all before the Court, is certainly a bar to the reopening of the probate obtained 30 years ago under circumstances which created no suspicion of a will the provisions of which have been accepted by all the parties as reasonable and proper and such as the testator would be likely to make.

The appeal is therefore dismissed with costs.

O. M. *Appeal dismissed.*

(1) (1910) 14 C. W. N. 1068.

PRIVY COUNCIL.

SRINATH ROY

v.

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P.C.*
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Feb 24;
March 2, 3, 4;
July 16.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Fishery—Right of jalkar or fishery in tidal navigable river in Bengal—River forming new channel not gradually but suddenly—Right of grantee of jalkar to follow the river where the subjacent soil does not belong to his grantor, the Crown, but to a riparian proprietor—Grant of rights by the Crown—Proof of title when no actual grant is in existence—Jalkar in existence from before the permanent settlement—English law of waters—Alluvion—Regulation XI of 1825.

The appellants claimed as proprietors of a several jalkar or fishery in certain tidal navigable waters in Eastern Bengal a decree for possession of an exclusive fishery in a portion of a suddenly and newly formed river channel as falling within the upstream and downstream limits of their several fishery, and alleged that the respondents were trespassers when they fished in it. The respondents pleaded their right to fish in a portion of the channel, of which they owned both the bed and the banks, as owners of the subjacent soil. There was no actual grant proved but the appellants produced documentary evidence which showed the existence of the jalkar as appertaining to their zamindari from before the Permanent Settlement.

Held, that original grants of jalkar prior to the Permanent Settlement are but rarely forthcoming, and resort must be had to secondary evidence of them, or to the inference of a legal origin to be drawn from long user.

Horidas Mal v. *Mahomed Jaki* (1), per Garth C. J; and the rule in *Fitzwalter's Case* (2), that the evidence of a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear, followed.

Held, in the present case, so far as such evidence can now be expected to be forthcoming as to particular grants more than a century old, the

Present: LORD MOULTON, LORD SUMNER, LORD PARMOOR, SIR JOHN EDGE AND MR. AMEER ALI.

(1) (1885) I. L. R. 11 Calc. 434, 445. (2) (1685) 3 Keble 242.

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evidence was sufficient to show that the competent authority—the Government of India in right of the Crown—did actually grant to the appellants' predecessors in title, or settle with them so as in effect to grant a jalkar right of several fishery in certain of the waters of the Ganges system in this suit.

Held, also, (following a numerous body of decisions in the Indian Courts) that it must now be taken as decided in Bengal that the Government grantee of a jalkar right can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters of the river system within the upstream and downstream limits of his grant, whether the Government owns the soil subjacent to such waters as being the long-established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment.

The whole series of decisions in Bengal on the subject from 1807 to 1905 reviewed and discussed.

The English common law admittedly does not apply to the mofussil of India, yet the Indian Courts have in many respects followed the English law of waters; and their Lordships have given careful consideration to the arguments that principles established under and for English conditions afford a sound guide to the rules which should be enforced in India; though they would in any case be slow to disturb decisions by which rules have been established for Bengal governing exclusive and important rights such as rights of jalkar, and unless they could be shown to be manifestly unjust or flagrantly inexpedient their Lordships would not supersede them.

The analogous rule in the United Kingdom connecting the subject's right to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership of the subjacent soil, is the result of conditions partly historical and partly geographical which have no counterpart in Lower Bengal, where above all the difference, indeed the contrast, of physical conditions is capital. By no analogy can rules applicable to the small, slow-running and comparatively unchanging rivers of England be profitably applied to such differing conditions.

In the case of alluvion as applied to rights of jalkar, and the argument that the right to follow the river ought to be limited to cases where the river encroachments were gradual, and should not be extended to an irruption as sudden and rapid as was the formation of the new channel in the respondents' lands, the Indian law, doubtless guided by local physical conditions has adopted in Regulation XI of 1825, sections 1 and 4, a rule varying somewhat from the rule established in England, and the analogy of the English law can hardly be called in aid when Indian legislation has thus an established and different rule on the same subject.

As to the Indian rule working injustice in that a landowner not only loses the use of his land when the river overflows it, but also the right to fish over his own acres in order that another may unmeritoriously fish in his place, which cannot occur under the English rule, there is no such proof that one rule is better than the other as would even approach the conclusion that the rule established in India should be set aside.

APPEAL 65 of 1912 from a judgment and decree (11th March 1908) of the High Court at Calcutta which reversed a judgment and decree (30th June 1905) of the Court of the Subordinate Judge of Faridpur.

The plaintifis were the appellants to His Majesty in Council.

The main question for determination in this appeal was as to whether the appellants were entitled to a decree for possession of a jalkar or fishery in one of the channels of the Ganges or Padma river in the district of Faridpur.

The facts of the case are sufficiently stated in the judgment of the Judicial Committee, as well as in the judgment appealed from. The basis of the claim as set forth in the plaint was that the appellants and their predecessors in title had acquired from Government, and had been in possession for many years, of a jalkar mahal in the Balabanta river (otherwise known by the names of the Padma and Bhubaneswar) as appurtenant to their zamindari of chur Mukundia, their rights of fishery thereunder not being confined to the lands of their zamindari, but extending to all waters within certain limits set out in a schedule to the plaint, including the waters in suit, which it was admitted were situated within the zamindari of the respondent.

It appeared from the maps and other evidence that there were two separate rivers running through the locality on somewhat parallel courses the distance

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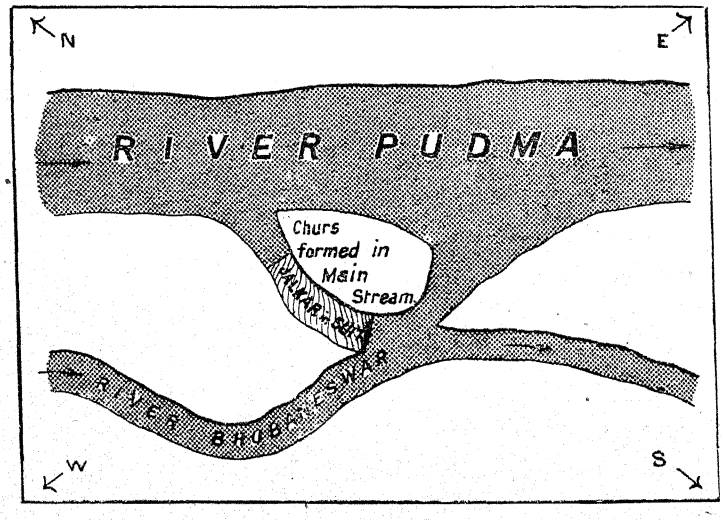
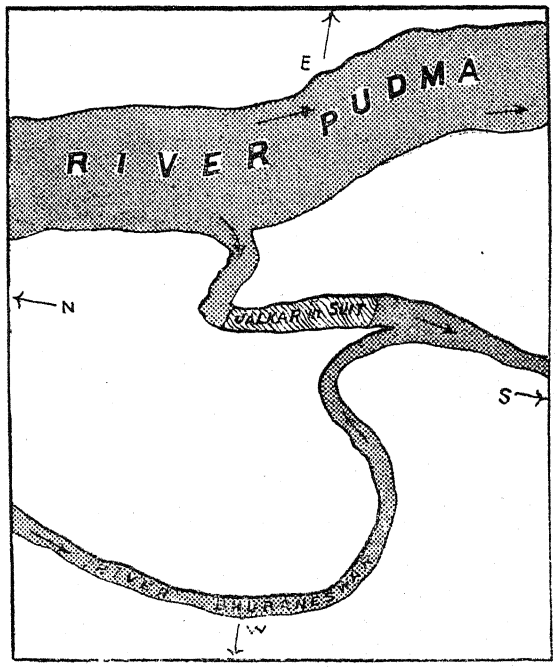
between them varying from about 8 miles to 2½ miles. The northern river, which is a very large one, more than 2 miles wide, is the Padma, and the southern one of much smaller dimensions, the Bhubaneswar. The latter river flows out of the Padma at a point some considerable distance above the upper limits of the fishery claimed by the appellants, and rejoins it some way below the lower limits of the fishery. It was not clear where the Balabanta river was, but the appellants' case was that it was a local name of that part of the Padma.

With reference to the particular stream, the jalkar of which was in dispute in the suit, the case made by the appellants' witnesses was that it was an integral part of the Padma which had been cut off by the gradual formation and joining up of churs, or islands, in the main streams, and that by the process of bifurcation the two rivers had joined, the point of junction being the lower limit of the jalkar in suit, This will appear more clearly from the rough sketch below which is part of the map annexed to the plaint.



The case on behalf of the respondent, on the other hand, was that the Padma and Bhubaneswar had been for many years separate, and (so far as the locality in suit was concerned) unconnected rivers; that in or about the year 1897 the stream in dispute (generally spoken of in the evidence on both sides as the Saitan-khali) broke through the low-lying land between the two rivers which formed part of the respondents' zamindari making a new stream joining the Padma to the Bhubaneswar. The rough sketch below is taken from the map made by a Commissioner to make a map of the locality and is said materially to support the respondents' case.



Of the issues settled only three are material to this appeal, namely, (9) Whether the plaintiffs have ever obtained a special grant over the jalkar in suit? (11) Was there any such navigable river as Balabanta

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as alleged by the plaintiffs? Does the disputed jalkar appertain to Balabanta river, and Beel Baor, and are the plaintiffs entitled to it though it may now lie on land outside their zamindari? and (12) Have the plaintiffs any right over the jalkar in suit? Have they acquired any right to it by adverse possession? Have they acquired any prescriptive right over it? Are these rights inconsistent?

The Subordinate Judge on these issues held that the plaintiffs had established their title to the jalkar in the river Balabanta which was the same as the Ganges or Padma, and had proved a continuous possession thereof from before the time of the Permanent Settlement; that the disputed jalkar was in fact partly within and partly without the limits of the land of the plaintiffs' zamindari; that their jalkar rights constituted a separate mahal; that the disputed stream was within the limits and formed a part of their jalkar, and that the plaintiffs had been in possession thereof until dispossessed by the first defendant (respondent) and his tenants.

An appeal by the defendant to the High Court was heard by HARINGTON and HOLMWOOD JJ. who held that the disputed jalkar was in a stream flowing over land of the first defendant; that it was a branch of the Padma, and not of the Balabanta or Bhubaneswar rivers; that it came into existence only eight years previously, and that therefore no prescriptive rights therein could arise; that no express grant to it had been proved, and that therefore the plaintiffs had established no title thereto; that it was outside the plaintiffs' zamindari; that certain thak proceedings of 1859 negatived the existence of any jalkar rights of the plaintiffs outside the limits of their zamindari; that a decree of 11th September 1816 expressly excluded the Ganges or Padma river from its declaration

as to the plaintiffs' right of jalkar in the Balabanta river; that the proceedings and decrees in evidence were not binding on the first defendant and his tenants, and that the suit failed, and must be dismissed.

The judgment of the High Court now on appeal was as follows:—

"The case presented by the plaintiffs was that there existed from before the Permanent Settlement a jalkar or fishery in the river Balabanta—otherwise called the Padma or Bhubaneswar, and that the fishery appertained to their zamindari chur Mukundia; that the fishery included not only the river Padma, but the streams running into it within certain specified boundaries extending beyond those of Chur Mukundia; that the stream in which the present claim was made had altered its course and come through the defendants' land, but still remained within the fishery granted to the plaintiffs.

"The defendants' case was that the plaintiffs had no grant of fishery extending outside the bounds of their pargana.

"Two questions, therefore, have to be determined: (*i*) whether the plaintiffs have established their grant from the Crown, of a fishery extending beyond the limits of Chur Mukundia; (*ii*) whether the river as to which the dispute has arisen, is within the area covered by their grant.

There is also a claim to the fishery by prescription, which will be dealt with later.

To begin with, there is evidence that a right of fishery was assessed to revenue in pergunnah Chur Mukundia at a very early time. The *hastbud* of 1790 shows a jalkar mahal or fishery bearing a rent of Rs. 374-8-10 The chowhaddibundi of pergunnah Chur Mukundia contains a reference to the mahal, *viz.*, 'River Balabanta Bil Baor,' rent Rs. 374-8-10, and the list of patawaris of Chur Mukundia shows that in 1821 there was a patwari of mahal jalkar river Balabanta. But these early documents contain no boundaries, and the difficulty in the case is to ascertain whether there is evidence to support the plaintiffs' case that they had a free fishery within the boundaries mentioned in a judgment of 1843. The *hastbud* of 1790 merely shows that a jalkar mahal was claimed in plaintiffs' zamindari. The quinquennial paper of 1795 shows that Chur Mukundia was settled with the plaintiff's predecessors, and included a jalkar called river Balabanta Bil Baor. This may or may not have been conterminous with the pergunnah Chur Mukundia, &c., and, in the absence of all evidence to the contrary, it would be presumed that it was conterminous.

"In a possession case in 1816, the plaintiffs' predecessors were declared to be in possession of a jalkar which extended down to the boundary of

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Bikrampur below the defendants estate, but from the wording of the judgment in that case it is clear that this Balabanta jalkar did not include any portion of the main Padma river. The words are :—'It appears that the river Padma is above the jalkar of the Balabanta river belonging to Ramkant Dutt and Harish Chandra, talukdars of Chur Mukundia, and it is below, *i.e.*, lower down the stream of jalkar Bikrampur, the zamindari of the opposite-party." Clearly, therefore, the river Padma was excluded from both the jalkars then in dispute.

"The Bikrampur zamindars did not dispute this declaration in the Civil Courts until 1843, when it was found that any claim they might have had was barred by limitation. It is recited in the judgment that this is the identical jalkar which was in dispute in 1816, and that the same jalkar was decreed to plaintiffs' predecessors in 1797. The judgment then proceeds to recite the upstream and downstream limits of the jalkar which includes the whole of the river Padma and the then Bhubaneswar, a southern branch of the Padma over a large tract of country measuring 9 miles each way, as would appear by actual plotting on the Amin's map. The case having been decided on the point of limitation, these boundaries could not affect any one but the Bikrampur defendants, and had the effect of determining in favour of the plaintiffs' predecessors any claim which the Bikrampur zamindars might assert to fish within the boundaries in question.

"The predecessors of the present defendants had their Chur Aminabad, pergunnah Jalalpur, within this tract of country, but there was then no stream flowing through their property. The down-stream limit is based in the judgment on the authority of the decree of 1797, but that decree is not produced, and it is remarkable that it appears to be in complete conflict with the proceedings of 1816.

"In 1861, the Government wanted to resume this jalkar, and re-assess it with revenue, but the Collector finding that it had been assessed to revenue as included in pergunnah Mukundia Chur from before the Decennial Settlement, released the jalkar from Government claims. The jalkar is spoken of in this judgment as the Balabanta jalkar referred to in the earliest documents we have already referred to, and no boundaries are given, but it is mentioned that there was a boundary dispute in the 1843 case, and that it appears that the river Balabanta is at present known as the river Padma.

"The very next year, in 1862, a note was recorded in the Thak Survey Register on an objection of plaintiffs' predecessors that their jalkar mahal had not been depicted on the map, that the jalkar mahal river Balabanta Bil Baor has been fixed within the very identical boundaries of Joar Bistupur, which would appear to confine it to the plaintiffs' landed estate of Chur

Mukundia, and give him no right lower down. It is argued that this entry is only signed by a mohurir, and may not be authentic, that it is inconsistent and must refer merely to revenue assessment and not to territorial limits.

"The entry is of the same nature as all the other entries in the Thak Register. It is a public record and has never been impugned, and we cannot assume that it refers to anything else than the territorial limits of the jalkar. The other entries of a similar nature on the same page go to show this.

"It appears that the zamindari some years after fell into the hands of Mr. Wise of Kumartoli, a zamindar of the neighbourhood, and that in 1872 he gave a lease of the jalkar describing it as lying in the Faridpur district only, although he gave similar boundaries to the decree of 1843, thus including the Padma river and large tracts of the Dacca district. It is a significant fact that he issued a registered letter a few weeks later to be read as part of the pottah including the portions of the Dacca district, which had been omitted in the pottah.

"The only other original pottah on the record is one granted by Garib Hossein Chowdhuri in 1860 to Mir Ali Khondkar. There are, however, numbers of sub-leases on the record, and several subsequent decrees of later years, by which the boundaries as given in the judgment of 1843 appear to have been recognized.

"In this state of facts it appears from the defendant's evidence, which is strongly corroborated by the Amin's map and also receives support from some admissions in cross-examination of the plaintiffs' witnesses, that in 1897 a stream known as the Shaitan Khal broke through some marshy land in the Government Chur Nawabganj, and cutting through the plaintiffs' and the present defendants' Churs, joined the old bed of the Bhubaneswar, a little above the down-stream limit of the plaintiffs' jalkar, as alleged in the judgment of 1843.

"The question that arises in this case is—can the plaintiffs claim a jalkar right to the fishery in this stream as part of their jalkar Balabanta Bil Baor ?

"The stream in dispute had its origin from the main stream of the Padma above the up-stream limits of the plaintiffs' jalkar, and this seems to distinguish the case from those where a river in which the zamindar has a franchise or incorporeal right of fishery, changes its course, and is diverted to a bed outside his zamindari.

"In the case of *Prosunno Coomar Sircar* v. *Ram Coomar Parooey* (1) it was laid down that a private right of fishery in a tidal navigable river must, if it exists at all, be derived from the Crown, and established by very

(1) (1878) I. L. R. 4 Calc. 53.

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clear evidence, as the presumption is against any such private right. In the Full Bench case, *Hori Das Mal* v. *Mahomed Jaki*(1), it is laid down that the Crown has power to grant the exclusive right of fishery in tidal navigable rivers to private individuals. Such a right, however, must ordinarily be proved either by proof of a direct grant from the Crown or by prescription.

"Now in this case there is absolutely no direct evidence of any grant of a jalkar in a tidal navigable river. The descriptions of the jalkar in the *hastbud* papers, the quinquennial papers and the Thak Survey register of 1862 go very much the other way. The proceedings of 1816 seem to show that the navigable river Padma was excluded from the jalkar, and it is not till 1843 that we get a distinct claim to the jalkar mahals of the river Padma, etc., though even in these proceedings there is no claim to fish in a tidal navigable river. On the contrary, the judgment recites that the river has washed away the boundaries of the jalkar mahal, which seems inconsistent with the river being included in the jalkar.

"It is true that the plaintiffs and their predecessors appear to have established a right by prescription against certain proprietors, north and east of the present defendants but they have established no such prescription against the defendants inasmuch as they admit they were dispossessed some four years after the stream broke into the defendants' land from the north-west. That stream was a branch of the Padma, and not of the Balabanta or Bhubaneswar river, and it broke out of the Padma above the plaintiffs' jalkar.

"It seems to us that whatever declarations the plaintiffs may have obtained in the Courts, and whatever kabuliats may have been given to them by fishermen in respect of other streams flowing through other zamindaries, the present defendants cannot be bound by any such declarations in the absence of an express grant and of prescriptive user in a stream which had only been in existence eight years before suit, during four years of which period the plaintiffs had apparently lost possession. The Subordinate Judge appears to have absolutely disregarded the entry of the boundaries in the Thak Map Register of 1862 and to have relied on the rough sketch map filed by the plaintiff, instead of the carefully prepared but cumbrous map of the Commissioner. We have, however, carefully analysed this map in every point, and we find that it does not support the case as made on the plaintiffs' map.

"And this divergence is of very great importance inasmuch as the plaintiffs allege that the whole of defendants' Chur was diluviated by the main stream, and that it is the formation of a Chur in front of the plaintiffs' and defendants' estate that has formed the new chanuel, which is, therefore,

(1) (1885) I. L. R. 11 Calc. 434.

part and parcel of the main stream. The Amin's map entirely negatives this, and shows that the stream in dispute is a tortuous stream whose very name goes to corroborate the evidence that it broke in suddenly from the Padma on the north, and does not re-join the Padma at all but falls into the old bed of the Bhubaneswar, which in its turn joins the Padma many miles lower down and far beyond the down-stream limits of the plaintiffs' alleged jalkar. In dealing with the documents he assumes that the Balabanta jalkar is an ascertained grant to fish in a tidal and navigable river, and thus begs the whole question. He refers to the leases and evidence of possession of this jalkar by the plaintiffs, and from this finds prescription against the present defendants, and an omission on their part to seriously contest that the plaintiffs had such a jalkar. That the plaintiffs had a jalkar outside defendants' land, the defendants are not concerned to deny; the whole question is—was that jalkar a grant of an incorporeal right from Government over a network of tidal navigable rivers or was it a right pertaining to their pergunnah Chur Mukundia only? He says the jalkar has been found by the Commissioner to be partly on the land of the defendants. What jalkar? He does not seem to distinguish batween two jalkar rights of a totally distinct character, *viz.*, the jalkar by special grant over the net work of tidal rivers, and the territorial jalkars appertaining to the respective estates of the parties. Finally, he bases his decision as to the jalkar appertaining to the plaintiffs' jalkar by accepting completely the plaintiffs' erroneous map and their incredible evidence thereon. Nothing was said to us as to the curious statement in the Subordinate Judge's judgment that the Commissioner found that the jalkar in respect of which the plaintiffs' ijaradars sued the father of the defendant No. 10 and defendant No. 1's Naib was identical with the jalkar in suit We have been through the whole of the Commissioner's report and connected papers, examined the evidence of Sridhar Chakravarti, the Naib in question, given on several different occasions, and we cannot find one word about any such case, nor is there any documentary evidence of it on the record. Had there been such a case, it would have been most important evidence. We can only imagine that it was not referred to at the Bar, because no trace of it appears on the record.

"In connection with the Amin's report it is an important circumstance that the jalkar on the Dacca bank of the river Padma appears from his map to belong to the Nawab of Dacca, and he complains in his report that the officers of the Nawab protested against his taking evidence from the plaintiffs' side, which might affect their master's rights. This indicates that other proprietors of the lands abutting on the river Padma do not admit the existence of the very extensive rights claimed by the plaintiffs.

"We cannot, on the meagre and unsatisfactory evidence before us, resume an improbable grant of rights of such an extensive nature. Having

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regard to all these facts and circumstances, it appears to us that the case must be decided on the principles laid down by Brett J., in the case of *Mathura Nath Chatterjee* v. *Sib Chandra Bose* (1). Where the jalkar has been asserted to be one held in connection with a zamindari, the only possible meaning of this expression according to the Judges who decided that case, is that it was one dependent on the zamindari and included within it. The fact that the revenue of the fishery was separately set out in the settlement of the estate, made by Government with the predecessor in title of the plaintiffs, would be no indication that the jalkar was separate and independent from the estate. The mere separate specification of the amount of revenue calculated on the basis of the profits realised from fisheries with the estate is no proof that there was a separate grant of a fishery independent of the estate; nor is it reasonable to suppose that a person having independent rights to a fishery, irrespective of his estate, would consent to have his separate estate in that fishery and the revenue due in respect of it, amalgamated with his rights and the revenue of his landed estate which was what was done both in the release proceedings of 1861 and the thak proceedings of 1862. The only evidence which goes beyond these matters are the judgment of 1843 against the Bikrampur zamindars, and the assertions of Mr. Wise and his sub-lessees and successors of such right against other zamindars in the neighbourhood.

"The assertions of Mr. Wise are no evidence against the defendants. The fact of the case in 1843 does not bind the defendants who were not parties to the suit, and do not claim through any persons who were parties for the stream now in dispute has only recently made its appearance in the defendants' zamindari. As against the defendants therefore there is no question of limitation or prescription.

"The plaintiffs to succeed against the defendants, must prove a distinct grant of a fishery extending beyond the limits of their pergunnah. There is no direct evidence of any such grant. The entry in the Thak map of 1862 negatives the contention that the boundaries of the fishery extended beyond the limits of Joar Bistupur, which, in its turn, is within the territorial limits of pergunnah Chur Mukundia. We therefore find that the plaintiffs have failed to establish their case of a jalkar such as that claimed by them in the defendants' zamindari, and we allow the appeal, and, setting aside the judgment and decree of the Subordinate Judge, order that the suit be dismissed with cost in both Courts."

On this appeal,

De Gruyther K.C. and *A. M. Dunne*, for the appellants, contended that they had established their

(1) (1907) 12 C. W. N. 334.

title to the jalkar in the Balabanta, or Ganges, or Padma river, and the limits and area of their jalkar rights. That they have rights of fishery in the waters indicated in the pleadings is admitted, but when and how they were created and how far they extend is in dispute. The jalkar, called river Balabanta Bil Baor, had been in the ownership and possession of the appellants and their predecessors in title from time immemorial, and it was settled as a distinct mahal as part of their estate Chur Mukundia at the time of the Permanent Settlement, and had been held and enjoyed as such ever since that time. The Balabanta river was at that date a local name for the main stream of the Ganges or Padma river, a tidal navigable river, its name denoting a strong running stream, and the words "Bil Baor" denote marshes and lakes. The boundaries of the jalkar as given in the Chowhaddi-bandi paper for 1202 (1795) were not now traceable, names having disappeared, but the jalkar rights being in the main stream of a tidal navigable river could not fall within, and were not limited by the boundaries of the land forming the zamindari itself. Though there is no actual grant proved, yet the documents in evidence show a prescriptive right from which a grant of the jalkar mahal, that is the right of fishery independent of the ownership of the subjacent land, can be presumed; and they also showed that the right of fishery existed in 1197 (1790 A. D.) in the Balabanta river either on the land of the appellants' zamindari, or on that of the respondents; that a separate revenue was assessed upon it, and that at the time of the Permanent Settlement the revenue for the appellants' zamindari Chur Mukundia was consolidated with that of the right of fishery, and became a separate towji of the Faridpur Collectorate. From 1797 owing to encroachments on the jalkar by

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the proprietors and tenants of perganna Bikrampur which was situate lower down the river and on the opposite side to Chur Mukundia, there was litigation in which the extent of the jalkar rights of the appellants' predecessors under their settlement was raised and determined. The proceedings of the Civil Court in September 1816 showed the boundaries of the Balabanta river, and the existence of the jalkar within those boundaries, and appertaining to the appellants' zamindari. Other documents, an isumnavisi of May 1821, a proceeding of the Collector of June 1843, a petition of 11th Chaitra 1266 (23rd March 1863), a robokari of the Collector dated 11th January 1861, and other evidence showed that the rights of the appellants' predecessors in the jalkar in suit were recognized and proved their possession from 1266 (1859). It must be taken therefore that the stream in dispute was a branch of the abovenamed river within the limits of the jalkar mahal, and the appellants had established their jalkar rights therein, and that the disputed stream flowed for a considerable distance through and over the appellants' lands. The High Court had held that the right of jalkar was not within the appellants' zamindari, but within that of the respondents, but the decided cases held that the right of fishery was an incorporeal right which could be exercised over land belonging to another person, and was not affected by a mere change in the course of the river, and that was the right the appellants claimed. Reference was made to *Forbes* v. *Mahomed Hossein* (1) and *Tarini Churn Sinha* v. *Watson & Co.* (2). The right of fishery followed the river from its old channel to the new one: *Ishurchund Rai* v. *Ramchund Mookherji* (3), *Gopeenath Rai* v. *Ramchunder*

(1) (1873) 12 B. L. R. 210, 216.
(2) (1890) I. L. R. 17 Calc. 963.
(3) (1807) 1 Morley's Dig. 561, Title "Jalkar," Case 7: 1 S. D. A. Sel. Rep. 221.

Turklunkar (1) [LORD MOULTON referred to *Lukhee Dasee* v. *Khatimah Beebee* (2)] *Nubkishen Roy* v. *Uchchootanund Gosain* (3), *Ramnath Thakoor* v. *Eshan Chunder Bannerjee* (4), *Krishnendro Roy Chowdhry* v. *Surnomoyee* (5), *Jogendra Narayan Roy* v. *Crawford* (6) and *Bhaba Prasad* v. *Jagadindra Nath Rai* (7). The proceedings and decrees proved were evidence against the respondents; and the judgment and decree of the Subordinate Judge were correct, and should be restored.

G. R. Lowndes, for the respondents, contended that the appellants had not established any grant to them by the Government of any right of fishery in the waters in suit; nor had any prescriptive right of fishery been proved. The respondents were only concerned with what the appellants got from the Government, and not with anything they got from any other source. The Crown owns the bed of every tidal navigable river and that gives the Crown the power to grant these rights of fishery, and shows that no one else had any such powers. Even if the Government did make such a grant, any such grant did not give any rights outside the boundaries of the grantee's own lands; and did not include any right to follow the river so as to enable the grantees to go over the lands of the respondents; yet the rights of jalkar which the appellants claim are in waters situate upon the respondents' property. Amongst the documents relied on by the appellants were certain settlement and revenue records showing that a jalkar in the Balabanta river had been treated as part of or appurtenant to the

(1) (1808) 1 Morley's Dig. 561, Title "Jalkar," Case 8: 1 S. D. A. Sel. Rep. 228.
(2) (1813) 1 Morley's Dig. 561, 562, Title 'Jalkar," Case 9: 2 S. D. A. Sel. Rep. 51.
(3) (1856) 12 S. D. A. 878: 2 Sev. Rep. 465, note.
(4) (1863) 2 Sev. Rep. 463.
(5) (1873) 21 W. R. 27, 29.
(6) (1905) I. L. R. 32 Calc. 1141.
(7) (1905) I. L. R. 33 Calc. 15.

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appellants' zamindari for many years, but there was nothing, it was submitted, in those records to show either that the jalkar referred to related to the Padma or Bhubaneswar river, or that it included any right of fishery outside the territorial limits of the appellants' zamindari; for the appellants had not proved that the Balabanta river in which they claimed a right of fishery was the same as the Padma or Bhubaneswar river or either of them. And even if the Balabanta river were the same as the Padma, and the appellants had acquired a prescriptive right of fishery therein, they did not thereby acquire a right of fishery in the waters in suit. The appellants also relied upon a number of kabuliats given to them and their predecessors in title by their lessees, and upon decisions in various legal proceedings to which neither the respondent nor his predecessors in title were parties; but it was submitted that the respondent was in no way bound by any statements in such kabuliats, or by the terms of any of the said decisions, as they did not refer to the jalkar in dispute in this litigation, nor did they in any case establish any right in the appellants to any jalkar outside the limits of their zamindari. The power to grant a right of jalkar cannot be dissociated from the ownership of the subjacent soil: no extension of the right can take place except by slow and gradual encroachments by the water on the land, and not by the sudden irruption of water, or sudden change in the course of a river: and should a landowner lose some of his land by the two last named causes, he should not be further penalised by not being able to take advantage of any jalkar which might be formed on his lost land. Reference was made to *Hudson* v. *Ashby* (1), *Hari*

(1) [1896] 2 Ch. 1, 12.

Das Mal v. *Mahomed Jaki* (1); "The Laws of England" by Lord Halsbury, Vol. 14 "Fisheries," page 574, section 2, cases 1269, 1270 and 579 case 1281; *Foster* v. *Wright* (2), *Mayor and Corporation of Carlisle* v. *Graham* (3). A several fishery in a tidal river the waters of which have permanently receded from one channel and flow in another, cannot be followed from the old to the new channel. [LORD PARMOOR referred to *Mayor of Colchester* v. *Brooke* (4).] *Attorney-General of British Columbia* v. *Attorney-General of Canada* (5); Bengal Regulation XI of 1825; *Lopez* v. *Muddun Mohun Thakoor* (6), *Imambandi* v. *Hurgobind Ghose* (7) deciding that land covered by diluvion remains the property of its owner at the time of its being flooded; *In re Hull and Selby Railway Company* (8), *Mercer* v. *Denne* (9), [SIR JOHN EDGE referred to *Arun Chandra Singh* v. *Kamini Kumar* (10)] *Malcolmson* v. *O'Dea* (11) and *Gaun* v. *Free Fishers of Whitstable* (12).

Though English common law did not apply to the mofussil of India, but only to the Presidency towns, yet the English law on this subject had been applied in India, instances being *Lopez* v. *Muddun Mohun Thakoor* (13) and *Baban Mayacha* v. *Nagu Shravucha* (14). *Sibessury Dabee* v. *Lukhy Dabee* (15) was also cited, a case which was distinguished in *Tarini Churn Sinha* v. *Watson and Company* (16),

(1) (1885) I. L. R. 11 Calc. 434, 444.
(2) (1878) L. R. 4 C. P. 438, 448.
(3) (1869) L. R. 4 Exch. 361.
(4) (1845) 7 Q. B. 339: 15 L. J. Q. B. 59.
(5) [1914] A. C. 153.
(6) (1870) 13 Moo. I. A. 467, 475, 476.
(7) (1848) 4 Moo. I. A. 403, 406.
(8) (1839) 5 M. & W. 327, 329, 332.
(9) [1904] 2 Ch. 558, 568.
(10) (1913) I. L. R 41 Calc. 683: L. R. 40 I. A. 32.
(11) (1863) 10 H. L. C. 593, 618.
(12) (1866) 11 H.L.C. 192, 217, 218.
(13) (1870) 13 Moo. I. A. 467, 472.
(14) (1876) I.L.R. 2 Bom. 19, 32, 33.
(15) (1864) 1 W. R. 88.
(16) (1890) I.L.R. 17 Calc. 963, 967.

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the Court saying "It has no bearing on the question at issue here. In that case the *daha* or streamlet, respecting which the dispute arose, formed a separate and apparently dried up armlet of the river Hooghli;" and it was held there "that an anterior right of fishery did not necessarily attach to the streamlet which had no connexion with the river Hooghly." [*De Gruyther K. C.* The definition of "*daha*" in Wilson's Glossary is "Land which is flooded in the rainy season and on which crops are then grown."] There was a distinction between a river coming in by sudden flood, and one encroaching by slow and gradual diluvion: the case of *Sibessury Dabee* v. *Lukhy Dabee* (1) was the only case of sudden irruption. The case of *Ramnath Thakoor* v. *Eshanchunder Bonnerjee* (2) was inapplicable here. In *Gopeenath Roy* v. *Ramchunder Turklunkar* (3), it was held that the defendant who had a right of jalkar in a river had no right to exercise it in a jhil formed on the plaintiff's land by the overflow of the river; and *Gureeb Hossein Chowdhree* v. *Lamb* (4) decided that the right of fishing in tidal creeks of a river belonged to the owner of the land into which the creeks ran. The case of *Jogendra Narayan Roy* v. *Crawford* (5) was distinguishable from the present case. The respondents' case here was that the Padma and Bhubaneswar were for many years separate and unconnected rivers and that the stream in dispute broke through the low-lying land between the two rivers and formed a new stream joining the rivers. If the appellants have a grant, there was nothing to show that the grant included a right of fishing outside their zamindari; and in the absence of any

(1) (1864) 1 W. R. 88.
(2) (1863) 2 Sev. Rep. 463.
(3) (1808) 1 Sel. Rep. 228.
(4) (1859) 20 S. D. A. 1357.
(5) (1905) I. L. R. 32 Calc. 1141.

evidence to show that, it must be presumed that the right granted was limited to their zamindari. The owners of the fishery must be presumed to be the owner of the subjacent soil: *Hanbury* v. *Jenkins* (1). There was no ground for presuming a lost grant, and therefore no prescriptive right: *Gardner* v. *Hodgson's Kingston Brewery Company* (2) per LINDLEY J. As to the laws administered in the mofussil of India before the High Courts were set up, see Morley's Digest, Introduction, pages xi, xxi, xxii and xcviii. The common law of England was introduced into the Presidency towns by the Supreme Court Charter of 1726. The High Court decision, it was submitted, was correct.

De Gruyther, K. C., in reply. The Sovereign was the absolute owner in India of all the soil, and had an equal to settle land covered by water, and land not so covered. In this case the boundaries of the jalkar mahal, it was submitted, were established: and it was shown that the right of jalkar claimed was an adjunct to the appellant's zamindari from before the Permanent Settlement.

The judgment of their Lordships was deliverd by

July 16. LORD SUMNER. In this action the plaintiffs claimed, as proprietors of a several fishery in certain tidal navigable waters in Eastern Bengal, a decree, for possession of an exclusive fishery in a portion of a river channel, of which the principal defendants own both the bed and the banks. They succeeded before the Additional Subordinate Judge of Faridpur and failed on appeal to the High Court at Calcutta. Hence this appeal to their Lordships' Board.

There is a section of the river system of the Lower Ganges, between Dacca on the left bank and Faridpur

(1) [1901] 2 Ch. 401, 415. (2) [1903] A. C. 229, 239.

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on the right, where the great stream divides and for many miles runs in two channels roughly parallel with one another. The general course is to the south-east. The northern of the two channels is much the larger, but the southern, the smaller of the two, is itself wide. Both channels are tidal and navigable.

The streams in the Gangetic delta are capricious and powerful. In the course of ages the land itself has been deposited by the river, which always carries a prodigious quantity of mud in suspension. The river comes down in flood with resistless force, and throughout its various branches is constantly eroding its banks and building them up again. It crawls or races through a shifting network of streams. Sometimes its course changes by imperceptible degrees; sometimes a broad channel will shift or a new one open in a single night. Slowly or fast it raises islands of a substantial height standing above high water level and many square miles in extent. Lands so thrown up are called "churs," and it is by chur-lands formed at some unknown though probably not remote date that the northern and southern channels in question are at present divided.

In the year 1897 a channel was broken through the defendants' chur-land in question. Though relatively small, even this stream was of considerable size; it is navigable for small craft, and is certainly within the ebb and flow of the tide. This new branch probably followed a line of depressions already existing, one end of which was actually an arm running up from the northern river.

The plaintiffs claim the exclusive fishery in this new navigable channel as falling within the up-stream and down-stream limits of their several fishery, and allege that the defendants are trespassers when they fish in it. The defendants justify their claim to fish

in a portion of this channel as part of the rights of owners of the subjacent soil and of persons claiming under them.

That the plaintiffs are entitled to some fishery right in the river waters generally, not far distant from the site in question, never was much disputed, and was admitted by the respondents before their Lordships' Board, but they dispute its origin and its extent. They say that this branch is of origin so recent that no title by prescripton or adverse possession arises as against themselves; that they are not affected by evidence of prescription against third parties; that even a several fishery, duly created in the main stream by the Government of India in right of the Crown, would not extend to this new branch, still less would rights acquired in the main stream by prescription against other riparian proprietors be exercisable in it; that the evidence neither establishes such bounds for the alleged exclusive fishery up-stream and down-stream as would bring this branch between them, nor shows that in fact any jalkar right was ever created by Government at all. In substance the Trial Judge found for an actual Government creation of the plaintiffs' right, as well as for the boundaries claimed by them. The High Court concluded against the plaintiffs on the question of the extent of their jalkar rights without determining their origin.

The evidence of the origin of the plaintiffs' rights is documentary, and does not depend on the credibility of witnesses. Chur Mukundia is the name of the plaintiffs' pergunnah. They produced among many other documents (i) an ekjai hastbud in respect of it for the year 1790, which showed that it then included a Mahal jalkar; (ii) a hakikat chowhaddi-bandi of the lands and jamas of that pergunnah for the year 1795, which showed that the name of the

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jalkar mahal was River Balabanta and Bil Baor with specified boundaries, of which the Kole Churi of Alipur alone can now be traced by name; (iii) dowl-kabuliyats of 1793 and 1799, specifying the amount of the dowl-jumma of the jalkar; and (iv) and issum-navisi mouzahwari of 1821 mentioning the jalkar in the River Balabanta, as a mouza of pergunnah Chur Mukundia. They put in (v) a robokari of the Court of the Collector of Faridpur dated 11th Janaury 1861, by which the Government recognised that this jalkar had been included as a mahal in the zamindari pergunnah Chur Mukundia (formerly Touzi No. 110 in the Dacca Collectorate, and now No. 4000 in that of Faridpur), since before the decennial settlement. It named the up-stream and down-stream limits, and stated that the Balabanta river, in which it was enjoyed, was the same as that known in 1861 as the Padma, that is the larger and more northerly of the two branches of the Ganges above described. The more southerly has been known for some fifty years as the Bhubaneshwar.

Some evidence, not very distinct, was given at the trial, apparently for the purpose of showing that no grant from the Government was any longer to be found among the papers belonging to the plaintiffs' zamindari, but no point seems to have been made then or since that the proper searches had not been made. Although, on the other hand when Government has created a separate estate of jalkar at the period in question, it is usual to find some entry of it in the decennial settlement papers no evidence was forthcoming to show that jalkar grants made prior to the decennial settlement or that settlements with zamindars made at the time of it must necessarily have taken the form of pottahs or some other muniments which should now be in the zamindar's possession,

or be recorded in the Government archives still in existence. In practice such original grants are but rarely forthcoming now, and resort must be had to secondary evidence of them, or to the inference of a legal origin to be drawn from long user [Garth, C.J., in *Hori Das Mal* v. *Mahomed Jaki* (1)]. The Trial Judge was satisfied that the plaintiffs had proved a Government grant or settlement about the end of the eighteenth century. He was overruled by the High Court, not on the ground that no such grant was proved, but that it was not shown to have been a grant of a several fishery of wide extent. The High Court thought that in reality it was only appurtenant to the plaintiffs' actual pergunnah and was limited by its riverine bounds.

Their Lordships accept the rule laid down in the case of *Hori Das Mal* v. *Mahomed Jaki* (1) (following the English rule in *Fitzwalter's Case* (2), that the evidence of a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear, but they are of opinion that, in so far as such evidence can now be expected to be forthcoming as to particular grants more than a century old, the evidence in the present case was sufficient to show that the competent authority—the Government of India in right of the Crown—did actually grant to the plaintiffs' predecessors in title, or settle with them so as in effect to grant, a jalkar right of several fishery in certain of the waters of the portion of the Ganges system in question.

The next point is one of metes and bounds. This depended partly on the above-named documents, partly on the records of certain litigation with the neighbouring zamindars of pergunnah Bikrampur and

(1) (1885) I. L. R. 11 Calc. 434. (2) (1685) 3 Keble 242 : 1 Mod. 105.

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persons holding under them in 1816 and 1843, put in as part of the history of the fishery and of the claims made to it, partly on the testimony of living patnidars, ijaradars, fishermen, and so on, and the local investigations of an ameen deputed by order of the Court. The ameen's reports and maps were accepted in both Courts, and by both parties on the present appeal. The plaintiffs' case depended on fixing by means of the above materials, supplemented by a series of maps from 1760 onwards, four points roughly forming a parallelogram, within which their alleged jalkar rights lay, the western or up-stream boundary and the eastern or down-stream boundary in each case extending from points north of the northern or larger channel, the Padma, to points south of the southern or smaller channel, the Bhubaneshwar, and the *locus in quo* of the dispute falling between them. The defendants contended, that in so far as any certain points were proved at all, the materials relied upon only showed that the fishery did not extend into any part of the Padma, but was limited by the right or southern bank of the main stream and thus excluded it. They pointed out that the Faridpur Collectorate was bounded by the right bank of the Padma, the whole breadth of the main stream being in the Collectorate of Dacca, and they argued that the robokari of 1861, which was the strength of the plaintiffs' case, proved at most a recognition of a fishery right, which stopped short of those waters in which it was now essential to the plaintiffs to make good their claim.

A sufficient answer is made by the plaintiffs. They obtain early evidence of the actual position of the points forming their boundaries north of the main stream from proceedings in suits decided in their favour between themselves or their predecessors in title and the owners of the Bikrampur zamindari, who

claimed some jalkar rights in the main Padma also, and by means of such proceedings in 1797, 1816, and 1843, by means of other similar proceedings in litigation with some of the present defendants in 1894, 1896, and 1897, and also by a long succession of ijara kabuliyats and pottahs, which they put in evidence, they prove *de facto* possession, as under their jalkar rights, of the whole fishery in both streams between their upper and their lower limits. It is an intricate task to trace the various spots mentioned from map to map, because of the periodic diluviation of trees and houses, though these are the least transient of the landmarks available. Matters are also complicated by variations in the names of the rivers, Bhubaneshwar, Krishnapur, Narina, Padma, and Balabanta or Balbanta. The result, however, is sufficiently clear. Further, the decision recorded in the robokari of 1861 was appealed to the Commissioner of the division at Dacca, who at that date exercised appellate jurisdiction in such matters over the Collectorate of Faridpur, and he affirmed the decision below. As this decision proceeded on the footing that the jalkar claimed extended over the waters of the Padma, and was a valid jalkar included in the permanent settlement, it may reasonably be inferred that the Commissioner of Dacca took note that the parties entitled to the jalkar, claimed rights within his collectorate, and finding nothing in the Dacca records to the contrary, affirmed the decision below for Dacca as well as for Faridpur.

The Trial Judge, following a long and considerable body of decisions in Bengal, held that, if the plaintiffs' rights in this stream or streams out of which the new branch opened were once established, they would extend to the waters of the new branch as soon as it was formed, a principle which is conveniently called "the right to follow the river." It does not appear

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that this current of authority was challenged or doubted either before the Trial Judge or the High Court; certainly its authority was binding upon both. The defendants' case simply was that in fact neither the plaintiffs nor their predecessors in title could be shown ever to have enjoyed or to have been entitled to any jalkar right except that lying within the boundaries of their zamindari and appertaining thereto. The High Court appears to have arrived at a conclusion in favour of the defendants' argument mainly in consequence of the view taken of the true meaning of the judgment of 1816, and of the significance of the Thakbast map of 1862, and a marginal note upon it. It is not necessary to examine the language of the judgment of 1816 in detail, but their Lordships are unable to hold that it excluded the main or northern stream from the plaintiffs' fishery, either expressly or by implication. The language is obscure, but, as their Lordships read it, the plaintiffs' construction of it was right. The Thak map was pressed beyond its legitimate effect. It was concerned only with that portion of the fishery which fell within pergunnah Bikrampur, and was inconclusive.

The question of the effect of deltaic changes in a river's course upon the exclusive right of fishing in it appears in the Indian decisions as long ago as the beginning of the last century. It was laid down in 1807 that if a river changes its bed the owner of jalkar rights in the old channel continues to enjoy them in the new one: *Ishurchund Rai* v. *Ramchund Mokhurji* (1). The converse case occurred in the following year. A land-owner sued the owner of jalkar rights in a tidal river for taking possession of a jhil formed on his land by the overflow of the river. The channel of the river had not altered, the jhil formed no

(1) (1807) 1 S. D. A. Rep. 221 : 1 Morley's Dig. 561.

part of it, and was only connected with it at the river's highest stage. Accordingly, it was held that the owner of the fishery, having no right over the plaintiffs' land, had no right to the fishery in waters thus formed upon his lands: *Gopeenath Roy* v. *Ramchunder Turklunkar* (1). This assumed some right of following the river and placed a particular limit upon it. It will be observed so far that whatever may have been the basis for the right of jalkar in the river, the right of fishing in the jhils was treated as belonging to the owner of the subjacent soil, a right which was shortly after, in 1813, held to be severable from the ownership of the soil, so that the bare grant by the landowner of the right of fishing in the jhil did not in itself convey any property in the soil: *Lukhee Dasee* v. *Khatimah Beebee* (2). Why the owner of jalkar right in the river has or may have an enjoyment of that right co-extensive with the waters of the river which permanently form part of it, though they have changed their course, is not stated. Not improbably it rested on local custom, for the Bengal Alluvion and Diluvion Regulation (XI of 1825) is careful in a cognate matter to keep local custom alive. At any rate the principle was well established as early as 1808 that a right of fishery follows the river whatever course it may take, for the ground on which in *Gopee Nath's Case* (1) the Sudder Court allowed the appeal from the Court below, which had acted on this principle, is simply that in point of fact the jhil in question, though formed by the rivers' overflow, was no longer so connected with it as to form part of the river. This was long considered to have been the effect of these decisions. Mr. Sevestre's note upon them in Vol. 2, p. 467, of his Reports is,

(1) (1808) 1 Mac. Sel. Rep. 228 : 2 Sev. Rep. 467 note.

(2) (1813) 2 S. D. A. Rep. 51.

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"A general right of fishery in a river, when not otherwise defined, is restricted to the channel of the river and water considered to form part of it, not extending to adjacent lakes or other pieces of water occasionally supplied by overflowings of the river but not actually connected with the channel of it." The rule was so applied in 1856 [*Nubkishen Roy* v. *Uchchootanund Gosain* (1)], and in 1863 [*Ramanath Thakoor* v. *Eshanchunder Bonnerjee* (2)]. In the former it was held that the right of jalkar in the river was confined to the river and streams flowing into or from it, exclusive of jhils not connected with the channel but extending to watercourses which though not immediately within the great channel of the river adjoin or flow into it or are supplied therefrom; "their right consists of the flowing stream and the adjuncts flowing from or into it." In the latter the limitation of the river's adjuncts flowing from or into it was held not to extend to adjacent sheets of water with which the river communicates only when in flood. "We think," says the Court, "the grant of jalkar must be construed as *prima facie* confined to the rivers and sheets of water communicating therewith to which the plaintiff might get access without trespassing on the land." It is true that these two decisions do not specifically deal with the case of the changed channel of a deltaic stream, but they do clearly lay down rules for defining the area of the waters in which the jalkar right is to be enjoyed, which carry it beyond the limits of actual navigability though confining it to waters which are adjuncts of the navigable stream. They make the right depend on the identity of the river in which it is enjoyed and do not confine it to such waters of

(1) (1856) 2 Sev. Rep. 465 note : 12 S. D. A. 878.

(2) (1863) 2 Sev. Rep. 463.

that river as are superimposed on the very land once owned by the grantor of the right. The current of decision was not unruffled by doubts. The Court observes in 1859, in *Gureeb Hossein Chowdhree* v. *Lamb* (1), "the part of the country through which the Megna flows is intersected with innumerable creeks into which the tide from the main river flows. The right of fishing in these tidal creeks belongs of right to the owner of the property into which they flow," but this case is explained by the fact that the part of the river in question was almost, if not quite, an arm of the sea. An opinion was indicated in 1864, though not absolutely necessary to the decision, in *Sibessury Dabee* v. *Lukhy Dabee* (2), that the extension of rights of fishery, in consequence of an expansion of the river in which they were enjoyed, ought to depend, as questions of alluvion would, upon the rapidity of the expansion. If sudden, it would work no change in the ownership of the submerged soil, and so cause no extension of the jalkar right; it would do both if it took place by gradual and imperceptible advances. The Court here inclined to connect the right of fishing indissolubly with the right to the soil subjacent to the waters in which the fishery right was enjoyed. In 1866 came two somewhat contradictory decisions. The Court in *Nobinchunder Roy Chowdry* v. *Radha Pearee Debia* (3), scouted as "preposterous" a claim to follow the diverted waters in which the plaintiff had the fishery, but this was without discussion of the authorities, and the claim was alleged not against the owner of the soil over which the diverted waters flowed but against the owner of the fishery in the waters of another river into which the plaintiff's river had

(1) (1859) 20 S. D. A. 1357, 1361. (2) (1864) 1 W. R. 88.
(3) (1866) 6. W. R. 17.

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burst and discharged itself. In the second case, *Gobind Chunder Shaha* v. *Khaja Abdool Gunny* (1), the plaintiff and defendant, joint owners of land and of a fishery, had made a partition of the land but not of the fishery and the plaintiff sought to oust the defendant from fishing over the land, which now belonged exclusively to him but had been overflowed by a change in the course of the waters. Sir Barnes Peacock in dismissing the suit observes "still the fishery existed in that part of the river out of which the fish was taken, although by a change in the course of the river it ran over the portion of the land which was allotted to the plaintiff under the butwara partition." Again, in 1873 [*Krishnendro Roy Chowdhry* v. *Surno Moyee* (2)] the Court somewhat reluctantly followed the rule, which it deemed to be settled, that the owner of the fishery where the river's channel has changed has "a right to follow the current," that he "may not only follow the river to any channel which it may from time to time cut for itself, but may continue to enjoy together with the open channel all closing or closed channels abandoned by the river right up to the time when the channel became finally closed at both ends." Upon the facts of that case it is the latter part of this proposition that is directly involved in the decision. The whole question was learnedly reviewed by Mr. Lal Mohan Doss in 1891 in his Tagore Lectures on the Law of Riparian Rights, (pages 372, *et seq.*) who, while admitting a settled current of authority in India to the contrary, urges the very arguments and conclusions of the now respondents and relies on the same authorities. Nevertheless, after this discussion had brought the question again before the Courts and the profession, the High Court in a critical decision

(1) (1866) 6 W. R. 41. (2) (1873) 21 W. R. 27.

affirmed the long-standing rule. This was in 1890 in the case of *Tarini Churn Sinha* v. *Watson & Co.* (1). The questions were directly raised: "Can a right of jalkar in a public navigable river exist apart from the right to the bed of the river, or must it necessarily follow that right?" "Do the defendants lose their vested right by a change in the river's course, though the river still is navigable and subject to public right?" This case raised the very question which has been in debate before their Lordships, for the change in the river's course was a sudden one taking place in the course of a single year and not by imperceptible or slow encroachment. The answer given by the Court was in favour of the owner of the right of fishing in the river. It purported to follow a converse decision in *Grey* v. *Anund Mohun Moitro* (2), and decided that "so long as the river retains its navigable character it is subject to the rights of the public, and the fishery remains in the person who was grantee from the Government." In *Grey's Case* (2), a change of channel had left an old bed either dry or containing only pools disconnected with the river, and it was held that what the river had abandoned, albeit part dry land and part jhils, became private property. Thenceforth it belonged to the riparian owners who could claim settlement of it from Government, and the reason given is that "the right of the defendant" (the owner of the fishery), "being granted out of and part of the Government's right to the river, no longer exists when the Government's right is itself gone." Thus it will be observed that in *Tarini's Case* (1) the Court conceived itself to be reducing the subject to symmetry by deciding that while on

(1) (1980) I. L. R. 17 Calc. 963. (2) (1864) W. R. Gap. No. 108.

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the one hand the owner of the fishery rights in the river lost them where there was permanent recession of the river, he increased them where there was permanent advance of the river. In the latter case the Court disregarded the conception of Government right to the river as being an incident of Government right to the subjacent soil, and treated the Government right and the right of its grantee in respect of the fishery as subsisting in the river wherever that river might flow, and not as subsisting in the flowing water only where and so long as it flowed over soil vested in the Government. This view has since been treated as established. That the jalkar right in the river extends over a piece of water formed originally by the river, but so far dried up as to be disconnected from it, except in the rains, during and just after floods, was decided in 1905 in *Jogendra Narayan Roy* v. *Crawford* (1). The ground of the decision is that such water is still part of the river system, and when that is so in fact the right of fishing persists in respect of it. This is the case of retrocession. So too in the case of *Bhaba Prasad* v. *Jagadindra Nath Rai* (2) in the same year the principle is thus expressed, "the jalkar rights were settled with the plaintiffs' predecessor many years ago. The plaintiffs by virtue of the settlements conferred upon them are entitled to exercise the right of fishery in the said river wherever it flows within the limits prescribed in the settlement itself." Both these cases purport to follow *Tarini's Case* (3), which was a case of an advance of the river into a newly formed channel, and the rest of a long line of settled authorities. It must now be taken as decided in Bengal that the Government's grantee can follow the

(1) (1905) I. L. R. 32 Calc. 1141. (2) (1905) I. L. R. 33 Calc. 15.
(3) (1890) I. L. R. 17 Calc. 963.

shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the up-stream and down-stream limits of his grant, whether the Government owns the soil subjacent to such waters as being the long-established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment.

Their Lordships were strongly and ably pressed to disregard, or at least to qualify, these decisions. The points made were (*a*) that in principle the right to grant a several fishery in tidal navigable waters is so essentially connected with the right to the soil and the bed of the channel, that no fishery right can exist where the grantor of the several fishery never has owned the subjacent soil; (*b*) that in any case the acquisition of fresh waters can go no further and can proceed no otherwise than the acquisition of fresh soil by alluvion, and therefore that an expansion of waters within which a jalkar right exists can only carry with it an extension of the jalkar right if it has taken place by imperceptible encroachments upon the land, and not by sudden irruption; and (*c*) that it would be grossly unjust to hold that the natural misfortune which swamps a landowner's soil by a river's encroachment should be accompanied by a legal ouster from such enjoyment as the natural disaster has left him. In extension of the last point, it was argued that the disputed site in fact covered the sites of former enclosed jhils which belonged to and had been enjoyed by the defendants and that no tresspass could be committed as against the plaintiffs in any view by fishing where the defendants had formerly been accustomed and entitled to fish in waters overlying their own land. This question of fact, which seems not to have been passed upon by the Courts below, was not sufficiently made out, but

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even if it were, it appears to be covered by the general argument.

For these contentions reliance was placed on the *Mayor of Carlisle* v. *Graham* (1), where Kelly, C.B., says: "We are called upon to decide the question which now arises for the first time: Is the several fishery of a subject in a tidal river, the waters of which permanently recede from a portion of its course and flow into and through another course, where the soil and the land on both sides of the new channel thus formed belong to another subject, transferred from the old to the new channel, and so a several fishery created in and throughout such new channel, or in some, and if any, in what part of it? In the case of *Murphy* v. *Ryan* (2) O'Hagan, J., in delivering the judgment of the Court, says, 'but whilst the right of fishing in fresh-water rivers in which the soil belongs to the riparian owner is thus exclusive, the right of fishing in the sea, its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the common law to be *publici juris* and so to belong to all the subjects of the Crown; the soil of the sea and its arms and estuaries and tidal waters being vested in the Sovereign as a trustee for the public. The exclusive right of fishing in the one case, and the public right of fishing in the other, depend upon the existence of a proprietorship in the soil of the private river by the private owner and by the Sovereign in a public river respectively.' And this is the true principle of the law touching a several fishery in a tidal river. If therefore the right of the Crown to grant a several fishery in a tidal river to a subject is derived from the ownership of the soil, which is in the Crown by the common law, a several fishery cannot be acquired even in a tidal river if the soil belong

(1) (1869) L. R. 4 Ex. 361, 367, 368. (2) (1868) 2 Ir. Rep. C. L. 143, 149.

not to the Crown but to a subject. And all the authorities, ancient and modern, are uniform to the effect that if by the irruption of the waters of a tidal river a new channel is formed in the land of a subject, although the right of the Crown and of the public may come into existence, and be exercised in what has thus become a portion of a tidal river or of an arm of the sea, the right to the soil remains in the owner, so that if at any time thereafter the waters shall recede and the river again change its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all right whatsoever in the Crown or in the public."

With this case has to be considered also *Foster* v. *Wright* (1). There the proprietor of a right of fishing in the Lune, at that part neither tidal nor navigable, was held entitled to "follow his river" when the river had so far shifted its course as to flow over another's land, and the person, to whom the land which came to form its new bed had previously belonged, was held to be a trespasser when he fished in its new channel. The change of bed had been gradual, perceptible and measurable over considerable periods of time, but from week to week imperceptible. It was held that the imperceptible changes had had the effect of producing an accretion to the land of the owner of the fishery, and that "the river had never lost its identity nor its bed its legal owner" (page 446); "he has day by day and week by week become the owner of that which has gradually and imperceptibly become its present bed, and the title so gradually and imperceptibly acquired cannot be defeated by proof that a portion of the bed now capable of identification was formerly land belonging to the defendant or his predecessors in title." The *Mayor of Carlisle* v.

(1) (1878) L. R. 4 C. P. D 438.

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Graham (1) was distinguished on the ground that in that case the river bed was a new bed, not formed by the gradual shifting of the old one but totally new, the old bed remaining recognisable in its old site but deserted. The Eden became a river with two beds: the Lune was at all times a river with only one though an ambulatory one. As counsel in *Foster* v. *Wright* (2) boldly argued for the right to "follow the river" in its Indian sense saying (page 440), "even a sudden and violent change in its course would not have taken away" the plaintiffs' right, and as the adoption of that *a fortiori* view would have made all consideration of gradual accretion immaterial, the decision must be regarded as one which negatives the contention of the respondents in the present case. As with the river Lune so the part of the river Eden which was in question in the *Mayor of Carlisle* v. *Graham* (1) is one which does not appear to be subject to frequent change. How the law might be if conditions similar to those of Bengal could occur in England is another matter. The above cases would have been more directly in point had the river in question been one which often and swiftly changes its course, as for instance the tidial Severn, of which Hale writes (Hargrave's Law Tracts, p. 16), "that river which is a wild unruly river, and many times shifts its channel, especially in that flat between Shinberge and Aure is the common boundary between the manors on either side, viz., the *filum aquae* or middle of the stream, and this is the custom of the manors contiguous to that river from Gloucester down to Aure." There is in this part of the Severn an ancient several fishery, enjoyed by the Lords of Berkeley under charters of Henry I., Richard I

(1) (1869) L. R. 4 Exch. 361. (2) (1878) L. R. 4 C. P. D. 438.

and John, which must be much more analogous to the jalkar in the present case than cases in the rivers Eden or Lune. A somewhat similar instance in Scotland is mentioned by Lord Abinger in *In re Hull and Selby Railway Company* (1), but the question of the right to follow the river does not appear to have arisen for decision in these cases.

It was admitted that the common law of England as such does not apply in the mofussil of Bengal, but the argument was that principles established under and for English conditions afford a sound guide to the rules which should be enforced in India. Their Lordships have given these arguments careful consideration, though they would in any case be slow to disturb decisions by which rules have been established for Bengal governing extensive and important rights such as right of jalkar, and unless they could be shown to be manifestly unjust or flagrantly inexpedient, their Lordships would not supersede them. The Indian Courts have in many respects followed the English law of waters. Sometimes their rules are the same; sometimes only similar. Jalkar may exist not only as a right attaching to riparian ownership but also "as an incorporeal hereditament, a right to be exercised in the tenement of another" [*Forbes* v. *Meer Mahomed Hossein* (2) as a *profit à prendre in alieno solo*, *Lukhee Dasee* v. *Khatimah Beebee* (3)]. In navigable waters such rights are granted by the Government of India, or, what is equivalent to a grant, settled with the grantee under the Revenue Settlement by the Government, and are thus derived from the Crown: *Prosunno Coomar Sircar* v. *Ram Coomar Parooey* (4). The freehold of the bed of navigable waters was deemed to be in the East India Company

(1) (1839) 5 M. & W., 327.
(2) (1873) 12 B. L. R. 210, 216.
(3) (1813) 2 S. D. A. Rep. 51.
(4) (1878) I. L. R. 4 Calc. 53.

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as representing the Crown and now is vested in the Government of India in right of the Crown (*Doe. dem. Seeb Kristo Bonerjee* v. *East India Co.* (1), *Nogender Chunder Ghose* v. *Mahomed Esof* (2). Where the bed thus forms part of the public domain the public at large is *primâ facie* entitled to fish. Thus the English analogy has been closely followed. Again, the sudden invasion of a private owner's land by the waters of a navigable river does not divest the property in the soil. If the change in the course of the navigable river results in the water in the new course being in fact navigable [that is, capable of being traversed by a boat at all seasons, *Chunder Jaleea* v. *Ram Churn Mookejee* (3), *Mohinee Mohun Doss* v. *Khaiah Ahsanoollah* (4)] the flooded land-owner must submit to have his land traversed by the vessels of the public in the course of navigation and cannot in right of his ownership erect works on his flooded soil to the obstruction of the navigation. None the less he remains the owner, and should the waters permanently retire his full rights as owner revive unless lapse of time or circumstances, or both, suffice to prove an abandonment of his rights of ownership for his part.

Still, there is one step which the Indian law has never taken, far as it has gone in the adoption of English rules. Often as the opportunity for so doing has arisen, it has never been held that the capacity of the Government of India to grant to or settle with a private owner the exclusive right of fishing in tidal navigable waters is so indissolubly bound up with its ownership of the soil subjacent to those waters that, no matter how those waters may subsequently change

(1) (1856) 6 Moo. I. A. 267 : 10 Moo. P. C. C. 140.
(2) (1872) 10 B. L. R. 406 : 18 W. R. 113.
(3) (1871) 15 W. R. 212.
(4) (1872) 17 W. R. 73.

their course, while still remaining part of the same river system within the up-stream and down-stream limits of the grant, the enjoyment of the right so granted cannot extend beyond the limits of the Government's ownership of the soil lying perpendicularly underneath them, as it may vest from time to time. It is one thing to presume the soil of the bed of a tidal navigable river to be vested in the Crown and to hold that the Government of India in right of the Crown can grant the fishery in the superincumbent waters in severalty and quite another to hold that the several fishery when once thus created is forever enjoyable only in waters that continue to flow precisely over ground which was in the Crown at the date of the grant "Whether the actual proprietary right in the soil of British India," says Garth, C.J., in the case of *Hori Das Mal* (1) already cited, "is vested in the Crown or not (a point upon which there seems some diversity of opinion) I take it to be clear that the Crown has the power of making settlements and grants for the purposes of revenue of all unsettled and unappropriated lands, and I can see no good reason why they should not have the same power of making settlements of jalkar rights and of lands covered by water as of land not covered by water. In either case the settlement is made for the purpose of revenue and for the benefit of the public." Again, the rights of the Crown are thus stated in *The Collector of Maldah* v. *Syed Suduroodeen* (2): "The right to resume land is one based on the right of the Government to a portion of the produce of every beegah of the soil as revenue, whereas the claim to possession of the jalkars of rivers not forming portions of settled estates is founded upon a supposed right in Government

(1) (1885) I. L. R. 11 Calc. 434. (2) (1864) 1 W. R. 116.

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as trustees of the waterways of the country to possess and to assign the exclusive possession of them to any individual it chooses on the payment of revenue for them in the shape of a fishery rent:" *Hurreehur Mookerjea* v. *Chundeechurn Dutt* (1), *Collector of Rungpore* v. *Ramjadub Sein* (2). See, too, *Radha Mohun Mundul* v. *Neel Madhub Mundul* (3) and *Satcowri Ghosh Mondal* v. *Secretary of State for India* (4), where the cases are collected and discussed.

In truth the rule which in the United Kingdom thus connects the subject's right to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership of the subjacent soil is itself the result of conditions partly historical and partly geographical which have no counterpart in Lower Bengal. In Bracton's time this rule would seem to have been unknown; at any rate he ignores it, and treats the right of fishing in rivers, as did the Roman law, as a right *pubilci juris*. Whether in his time this was at common law orthodox or heterodox, or whether he supplemented the defects of our insular system by a reversion to that of Rome, need not now be considered. What is clear is that during the many years between his time and Hale's the generality of the right of river-fishing, if it ever had been the doctrine of the common law, was such no longer. According to Hale (*De jure maris*, page 1, Chap. 4; Hargrave's Law Tracts, page 11), "the right of fishing in the sea and the creeks and arms thereof is originally lodged in the Crown as the right of depasturing is originally lodged in the owner of the wastes whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. . . .

(1) 17 S. D. A. Rep. 641.
(2) (1863) 2 Sev. Rep. 373.
(3) (1875) 24 W. R. 200.
(4) (1894) I. L. R. 22 Calc. 252.

The King is the owner of this great waste, and as a consequent of his propriety hath the primary right of fishing in the sea or creeks or arms thereof." Be it observed that this doctrine may be called essentially insular, and that the proofs of it which Hale adduces are purely English, namely, Close Rolls, Parliament Rolls, and Rolls of the King's Bench mainly in Plantagenet times, and that he places on Bracton's Roman doctrine an interpretation, confining it to rivers which are arms of the sea, which is itself a dissent from that doctrine. The question how far a rule established in this country can be usefully applied in another, whose circumstances, historical, geographical, and social, are widely different, is well illustrated by the case of navigability, as understood in the law of the different States of the United States of America. Navigability affects both rights in the waters of a river, whether of passing or repassing or of fishing, and the rights of riparian owners, whether as entitled to make structures on their soil which affect the river's flow, or as suffering in respect of their soil *quasi*-servitudes of towing, anchoring, or landing in favour of the common people. The Courts of the different States, minded alike to follow the common law where they could, found themselves in the latter part of the eighteenth and the early part of the nineteenth centuries constrained by physical and geographical conditions to treat it differently. In Massachusetts, Connecticut, New Hampshire and Vermont, where the rivers approximated in size and type to the rivers of this country, the English common law rule was followed, that tidality decided the point at which the ownership of the bed and the right to fish should be public on the one side and private on the other. Other States, though possibly for other reasons since they possessed rivers very different in character from

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those of England, namely, Virginia, Ohio, Illinois, and Indiana followed the same rule. But in Pennsylvania, North Carolina, Iowa, Missouri, Tennessee, and Alabama, this rule was disregarded, and the test adopted was that of navigability in fact, the Courts thus approximating to the practice of Western Europe (*see* Kent's Commentaries, iii, 525). The reasoning has been put pointedly in Pennsylvania. Chief Justice Tilghman says in 1810, in *Carson* v. *Blazer* (1), "the common law principle concerning rivers" (viz., that rivers, where the tide does not ebb and flow, belong to the owners of adjoining lands on either side), "even if extended to America, would not apply to such a river as the Susquehanna, which is a mile wide and runs several hundred miles through a rich country, and which is navigable and is actually navigated by large boats. If such a river had existed in England no such law would ever have been applied to it." [See too, *Shrunk* v. *Schuylkill Navigation Co.*, (2)]. Thirty years later in *Zimmerman* v. *Union Canal Co.*(3), President Porter observes, "the rules of the common law of England in regard to the rivers and the rights of riparian owners do not extend to this Commonwealth, for the plain reason that rules applicable to such streams as they have in England above the flow of the tide, scarcely one of which approximate to the size of the Swatara, would be inapplicable to such streams as the Susquehanna, the Allegheny, the Monongahela," and sundry other "rivers of Damascus." A similar deviation, equally grounded in good sense, from the strict pattern of the English law of waters lies at the bottom of the current of Indian cases previously referred to, and forms its justification.

(1) (1810) 2 Binney 477. (2) (1826) 14 Sergeant & Rawle 78.
(3) (1856) 1 Watts & Sergeant 351.

In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social, and historical conditions to which that rule is to be adapted. In England the rights of the Crown and other rights derived from them have long been established by authority, even though their historical origin is imperfectly known or conjectural. The result may be that the law is quite certain and yet is based on considerations of history and precedent which are quite the reverse. In Bengal a special history, and a special theory of rights, tenures and obligations condition the rules applicable to such an incorporeal hereditament as that now in question. In England we go back before Magna Charta for commencement of several fisheries in tidal navigable waters, and know little of their actual origin. In Bengal it is sufficient to say that at the time of the decennial or the permanent settlement, or since, such rights, though possibly descending from remote antiquity, were settled with the Government of India, whose special position, originating on 12th August 1765, when the East India Company became receiver-general in perpetuity of the revenues of Bengal, Orissa, and Behar, is historically well known. English tenures and Bengal zemindari rights, unduly assimilated at one time, have never fully corresponded to one another. Above all the difference, indeed the contrast, of physical conditions is capital. In England the bed of a stream is for the most part unchanging during generations, and alters, if it alters at all, gradually and by slow processes. In the deltaic area of Lower Bengal change is almost normal in the river systems, and changes occur rarely by slow degrees, and often with an almost cataclysmal suddenness. If English cases were applied to Bengal, so that

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the area of enjoyment of a several fishery in tidal navigable waters should be limited to the area within which the Crown, the assumed grantor of the fishery, had owned the subjacent soil at the time of its grant, who could say from time to time what the bounds of that enjoyment are, and where the ownership of the soil is to be delimited? The course of the waters has been in flux for ages: at what date is this ownership to be taken? As Lord Abinger says of the rule of gradual accretion of soil in *In re Hull and Selby Railway* (1), the theoretic basis of which has been variously stated from the time of Blackstone to the present day (*see* the different theories collected by Farwell, L. J., in *Mercer* v. *Denne*(2), "the principle is founded on the necessity which exists for some such rule of law for the permanent protection and adjustment of property." Take which date you will, the ever-shifting river does not run now where it ran then, and if the ownership of the soil remains as it was, it is sheer guesswork to say in which part of the present waters the grantee of jalkar rights shall enjoy his several fishery under his grantor's title, and in which parts he must abstain, since the waters flow over the soil of private owners? Any given section of the river system is in all probability a shifting and irregular patch-work of water flowing over soil which belonged to the Sovereign at the selected date and of water flowing over soil then belonging to other owners and since encroached upon, with the background of a probability that before the date in question, and yet within historic times, no water may have run there at all. By what analogy can rules applicable to the Eden and the Lune be profitably applied to such physical conditions?

(1) (1839) 5 M. & W. 327. (2) [1904] 2 Ch. 558.

It was urged that the established rule with regard to alluvion should be applied to rights of jalkar; that since the right to accretions and the liability to derelictions of soil attached only to gradual accretions or to erosions taking place by imperceptible degrees, so too the right of the owner of the fishery to "follow the river" ought to be limited to cases where the river's encroachments were gradual, and ought not to be extended to an irruption as sudden, and accomplished as rapidly, as was the formation of the channel in question in the defendants' lands. It is to be observed that here too Indian law, doubtless guided by local physical conditions, has adopted a rule varying somewhat from the rule established in this country. Where under English conditions the rule applies to "imperceptible" alterations, Regulation XI of 1825, articles 1 and 4, speak of "gradual accession." The analogy of the English rule can hardly be prayed in aid when Indian legislation has thus an established and different rule on the same subject. Further, as the Indian rule is established now beyond question, it may perhaps be said without offence of the Indian as of the English rule, that it represents rather a compromise of convenience than an ideal of justice, for that which is a man's own does not become another's any more agreeably to ideal justice by being filched from him gradually instead of being swallowed whole. In any case the analogy is not in *pari materiâ*. Property in the soil is one thing; enjoyment of a profit *à prendre* in flowing water may in some respects be another. True, the profit *à prendre* is to be enjoyed *in alieno solo;* such is its nature. True too that at the time of the grant, the grantor has no power to create this incorporeal hereditament where his ownership of the soil does not extend; but when the power to grant arises from sovereignty, and has never been

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decided to be limited to the bounds of the grantor's proprietorship as it may continue to exist from time to time, the mere fact that the jalkar right is classified in the language of the English law of real property as a *profit à prendre in alieno solo* does not prevent its proprietor from being entitled to follow the river in its natural change. The fish follow the river and the fisherman follows the fish; this may be right or wrong, but the question is not settled by asking under what circumstances of natural physical change the proprietor of an acre of dry land, which has vanished from sight, can claim to have still vested in him an equal area of river-bed on the same site, or another acre of dry land transferred by the river and attached by accretions to another proprietor's land.

Lastly, it is said to be unjust that a land-owner should not only lose the use of his land when the river overflows it, but also the right to fish over his own acres and in his own waters, in order that another may unmeritoriously fish in his place. There is some begging of the question here; the waters are not his waters, nor is the change confined to the flooding of his fields. It is the river that has made his land its own; the waters are the tidal navigable waters of the great stream. In physical fact the land-owner enjoys his land by the precarious grace of the river, whose identity is so persistent, and whose character is so predominating, as almost to amount to personality; and is it fundamentally unjust that in law too he should lose what he has lost in fact, and be precluded from taking in substitution for his lost land an incorporeal right which has been granted not to him but to another? The sovereign power lawfully invests its grantee with jalkar rights in part of the river; is it unjust that when that river shifts its course, changing in locality but not in function, the

owner of those rights should still enjoy them in that self-same river, instead of being despoiled of them by the course of nature, which he could neither foresee nor control? There must be some rule and there must be some hardship. To say the least there is no such proof that one rule is better than the other as would even approach the conclusion that the rule established should now be set aside.

Their Lordships are of opinion that no reason sufficiently cogent has been found to warrant them in disregarding the settled Indian authorities, and being further of opinion that the plaintiffs established their claim at the trial, they will humbly advise His Majesty that the appeal should be allowed with costs here and below, and that the judgment appealed from should be set aside and the judgment of the Trial Judge restored.

Appeal allowed.

Solicitors for the appellants: *Walkins & Hunter.*
Solicitors for the respondents: *Theodore Bell & Co.*

J. V. W.

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

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May 26.

KULADA PROSAD DEGHORIA

v.

KALI DAS NAIK.*

Hindu Law—Religious endowment—Shebait—Nature of debutter grants, where grantee is to enjoy properties from generation to generation on performance of sheba of the goddess—Permanent leases by grantee, validity of—Civil Procedure Code (Act V of 1908), s. 99—Ambiguity —Evidence.

In the construction of ancient grants and deeds, evidence is admissible as to the manner in which the thing granted has always been possessed and used, for so the parties thereto must be supposed to have intended.

Weld v. *Hornby* (1), *Rex* v. *Osbourne* (2) followed.

The Court may call in aid acts under the deed as a clue to the intention.

Doe v. *Ries* (3) followed.

This principle does not apply unless there is an ambiguity.

Attorney-General v. *The Corporation of Rochester* (4) followed.

Consequently, while in a case of ambiguity the Court will uphold that construction of a deed which justifies a long usage as to the application of trust funds, the Court will not, where there is no ambiguity, accept an erroneous interpretation though consistent with usage, so as to sanction a manifest breach of trust.

Drummond v. *Attorney-General* (5) followed.

If there is a deed which says, according to its true construction, one thing you cannot say that the deed means something else, merely because the parties have gone on for a long time so understanding it.

Sadlier v. *Biggs* (6) followed.

* Appeal from Appellate Decree, No. 2056 of 1910, against the decree of E. B. H. Panton, District Judge of Burdwan, dated March 12, 1910, confirming the decree of Atul Chandra Batabyal, Subordinate Judge of Burdwan, dated Jan. 2, 1909.

(1) (1806) 7 East 197 ; 8 R. R. 608.
(2) (1803) 4 East 32.
(3) (1832) 8 Bing. 178, 181.
(4) (1854) 5 De G. M. & G. 882.
(5) (1849) 2 H. L. C. 837, 861, 863.
(6) (1853) 4 H. L. C. 435, 458

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Where two ancient *debutter* grants by one of the Maharajas of Pachete were held to be ambiguous, the properties having been given to the grantee *who was to enjoy them from generation to generation* on performance of the *sheba* of the goddess, and in 1829 the successors of the grantee gave two permanent leases to the predecessors in interest of the plaintiffs :

Held, that in those circumstances the Court might determine the true character of the endowment from the manner in which the dedicated properties had been held and enjoyed.

That the properties in dispute were not absolute *debutter* properties of the goddess, but were the personal properties of the grantees subject to the charge of the worship of the goddess.

Ganga v. *Brindaban* (1), *Madan* v. *Kamal* (2) referred to.

That the permanent leases had become indefeasible by lapse of time.

Jagamba Goswamini v. *Ram Chandra Goswami* (3), *Damodar Das* v. *Lakhan Das* (4) as explained in the case of *Madhu Sudan Mandal* v. *Radhica Prosad Das* (5) followed.

SECOND APPEAL by Kulada Prosad Deghoria, the defendant No. 1.

The facts out of which this appeal arises are briefly as follows. Towards the beginning of the 19th century the then Maharaja of Pachete made two grants of land in favour of one Deb Nath Deghoria the predecessor of the appellant (defendant No. 1). The first grant was described as a *debutter* pottah of village Jamir Kuri given for the *sheba* of the goddess Kalyaneswari, the grantee being directed to bless the grantor and to enjoy the land peacefully. In the second deed village Debipur was granted as rent free *debutter* through the grantee for the *sheba* of the same goddess, the grantee being directed to enjoy the land from generation to generation after performance of the *sheba* of the goddess. Within a few years of the grants in favour of Deb Nath Deghoria the properties were partitioned between him and his brother Shib Nath Deghoria, and

(1) (1865) 3 W. R. 142.
(2) (1867) 8 W. R. 42.
(3) (1903) I. L. R. 31 Calc. 314.
(4) (1910) I. L. R. 37 Calc. 885 ; L. R. 37 I. A. 147.
(5) (1912) 16 C. L. J. 349.

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on 2nd August and 14th September 1829, the representatives of the two branches of the Deghoria family executed two permanent leases (in respect of their different shares) in favour of one Kanai Gope and of Kinkar Gope and Chakar Gope respectively. These leases, which were not challenged for more than 60 years either by any of the shebaits or by the successive Rajahs of Pachete, formed the basis of the plaintiff's title, the lessees being the predecessors in interest of the co-plaintiffs. The controversy between the parties was with regard to the true nature of these grants. Further, the suit was essentially one for possession of property, the plaintiffs not praying for cancellation of any execution sale as no operative sale had ever taken place. Both the Courts below (viz., the District and Subordinate Judges of Burdwan) considering the terms of the deed at best inconclusive, referred to the manner in which the dedicated properties had been held and enjoyed, and concurrently found that the properties had been throughout held and enjoyed by the Deghorias as secular properties subject to a religious charge. The defendant No. 1 then preferred this appeal to the High Court, questioning the validity of the plaintiff's title.

Babu Golap Chandra Sarkar (with him *Babu Sarat Chandra Dutt*, *Babu Narendra Kumar Bose*, *Babu Biraj Mohan Mazumdar* and *Babu Rishindra Nath Sarkar*), for the appellant. The suit is improperly constituted, there being a misjoinder of plaintiffs; the suit is also barred by limitation, treated as a suit for declaration of title: *Mohabharat Shaha* v. *Abdul Hamid* (1) and *Legge* v. *Rambaran* (2). The dedication of the *debutter* properties was of the completest character known to law and the properties

(1) (1904) 1 C. L. J. 73. (2) (1897) I. L. R. 20 All. 35.

vested absolutely in the goddess: *Jagadindra Nath Roy* v. *Hemanta Kumari Devi* (1). The shebaits, consequently, could not grant a permanent lease of any portion of the *debutter* grants, and therefore the leases to the predecessors of the plaintiffs were invalid. The Court was not entitled to look to the conduct of the parties for assistance in the construction of the original grants, as the properties in suit were the absolute *debutter* of the goddess: *Abhiram Goswami* v. *Shyama Charan Nandi* (2).

Dr. Rashbehari Ghose (with him *Babu Bipin Behari Ghose*), for the respondents. The question of the true character of the endowment is immaterial, because, as the permanent leases of 1829 had never been impeached, any suit now instituted for cancellation of these leases and for redemption of the properties from the lessees or their representatives would be successfully met by the plea of limitation, and the permanent leases have consequently become indefeasible: *Jagamba Goswamini* v. *Ram Chandra Goswami* (3), *Damodar Das* v. *Lakhan Das* (4), and *Modhu Sudan Mandal* v. *Radhika Prosad Das* (5). Even if the objection as to misjoinder be well founded it will not be a good ground for reversal of the decision of the learned Subordinate Judge under sec. 99 of the new Civil Procedure Code which was in force when the appeal was preferred to the District Judge of Burdwan. Besides this suit is not barred by limitation as it is essentially one for possession of property, there being no prayer for the cancellation of any execution sale, as no operative sale had ever taken place. The two deeds are ambiguous for

(1) (1904) I. L. R. 32 Calc. 129; L. R. 31 I. A. 203.
(2) (1909) I. L. R. 36 Calc. 1003; L. R. 36 I. A. 148.
(3) (1903) I. L. R. 31 Calc. 314.
(4) (1910) I. L. R. 37 Calc. 885; L. R. 37 I. A. 147.
(5) (1912) 16 C. L. J. 349.

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although the properties were described as debutter, yet they *were given to the grantee who was to* enjoy them from generation to generation on performance of the *sheba*. The Courts below have concurrently accepted the contention of the plaintiffs which was in their opinion consistent with the terms of the deeds and also the manner in which the dedicated properties had been held and enjoyed for nearly a century: see *Ganga* v. *Brindabun* (1), *Ram Chandra Mukherji* v. *Ranjit Singh* (2). Consequently these properties after the *debutter* grants retained their secular character, though they became impressed with a religious charge: *Ashutosh* v. *Doorga Charan Chatterjee* (3). Hence the leases of 1829 were not liable to be impeached and afforded a solid foundation for the title of the plaintiff.

Babu Golap Chandra Sarkar, in reply.

Cur. adv. vult.

MOOKERJEE AND BEACHCROFT JJ. This is an appeal by the first defendant in a suit for recovery of possession of immoveable property on declaration of title. The Courts below have concurrently found in favour of the plaintiffs, and have given them a decree, on declaration that their title has not been affected by the sale in execution of a rent decree in a fraudulent suit for recovery of alleged arrears of rent. On the present appeal, one substantial question of law has been argued touching the validity of the title of the plaintiffs which is based ultimately on two permanent leases granted by a *shebait* in respect of the properties of a religious endowment. The facts antecedent to this litigation, though of a complex character, may be

(1) (1865) 3 W. R. 142.
(2) (1899) I. L. R. 27 Calc. 242, 251; 4 C. W. N. 405, 410.
(3) (1879) I. L. R. 5 Calc. 438; L. R. 6 I. A. 182.

briefly narrated in so far as such recital is necessary for the appreciation and determination of the question of law raised before us.

The disputed properties lie within the zemindary of the Maharaja of Pachete. In the early years of the 19th century, the then Maharaja made two grants in favour of one Deb Nath Deghoria, the predecessor of the appellant. The first of these grants was described as a *debutter* pattah of village Jamir Kuri given for the *sheba* of goddess Kalyaneswari. The grantee was directed to bless the grantor and to enjoy the land peacefully. In the second deed, village Debipore was granted as rent free *debutter* through the grantee for the *sheba* of the same goddess, and the grantee was directed to enjoy the land from generation to generation after performance of the *sheba* of the goddess. The controversy between the parties relates to the true nature of these grants. On behalf of the defendant, appellant, it has been contended that the dedication was of the completest character known to law, to use the language of their Lordships of the Judicial Committee in *Jagadindra* v. *Hemanta Kumari* (1); the properties consequently vested absolutely in the goddess, and it was not competent to the *shebaits* to grant a permanent lease of any portion thereof as was done to the predecessors of the plaintiffs. On behalf of the plaintiffs, respondents, it has been argued, on the other hand, that the properties, after the grants, retained their secular character, though they became impressed thereby with a religious charge, as in the case of *Asutosh* v. *Doorga* (2). The Courts below have concurrently accepted the contention of the plaintiffs, respondents, which, in their opinion, is consistent with the terms of the deeds, and also with the manner

(1) (1904) I. L. R 32 Calc. 129; L. R. 31 I. A. 203.

(2) (1879) I L. R. 5 Calc. 438; L. R. 6 I. A. 182.

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in which the dedicated properties have been held and enjoyed for nearly a century. This view has been assailed on behalf of first defendant, who claims to be the present *shebait* of the endowment, and maintains that the properties in suit are the absolute *debutter* of the goddess. In support of this view, reliance has been placed upon the decision of their Lordships of the Judicial Committee in *Abhiram Goswami* v. *Shyama Charan Nandi* (1). In our opinion, the decision mentioned does not assist the appellant. The two deeds are at least ambiguous, for although the properties are described as *debutter*, yet they are given to the grantee, who is to enjoy them from generation to generation on performance of the *sheba* of the goddess. The view may reasonably be maintained that the grants were not made to the goddess herself but were made to Deb Nath Deghoria in order that he might, on performance of the *sheba* of the goddess, enjoy the properties from generation to generation. In these circumstances, the Court may determine the true character of the endowment from the manner in which the dedicated properties have been held and enjoyed : *Ganga* v. *Brindabun* (2), *Muddun* v. *Komul* (3), *Ram Chandra* v. *Ranjit Singh* (4), *Madhub* v. *Sarat* (5), *Tulsi* v. *Siddhi* (6) and *Mohan Tikait* (7). But it has been strenuously contended on behalf of the appellant that the Court is not entitled to look to the conduct of the parties for assistance in the construction of the grants. This argument is opposed to the well-established rule that, in the construction of ancient grants and deeds, evidence is admissible as to the manner in which the

(1) (1909) I. L. R. 36 Calc. 1003 ; L. R. 36 I. A. 148.
(2) (1865) 3 W. R. 142.
(3) (1867) 8 W. R. 42.
(4) (1899) I. L. R. 27 Calc. 242, 252 ; 4 C. W. N. 405, 410.
(5) (1910) 15 C. W. N. 126.
(6) (1911) 9 Ind. Cas. 650.
(7) (1913) 19 Ind. Cas. 337.

thing granted has always been possessed and used, for so the parties thereto must be supposed to have intended. *Weld* v. *Hornby* (1), *Rex* v. *Osbourne* (2). As Tindal C. J. observed in *Doe* v. *Ries* (3), the Court may call in aid acts under the deed as a clue to the intention. This principle, as was pointed out by Lord Halsbury, L. C. in *The North Eastern Railway Company* v. *Lord Hastings* (4), does not apply, unless there is an ambiguity, for even usage does not justify deviation from terms which are plain: *Attorney-General* v. *The Corporation of Rochester* (5), *Attorney-General* v. *Sidney, Sussex College* (6). Consequently while in a case of ambiguity, the Court will uphold that construction of a deed which justifies a long usage as to the application of trust funds, the Court will not, where there is no ambiguity, accept an erroneous interpretation, though consistent with usage, so as to sanction a manifest breach of trust: *Drummond* v. *The Attorney-General* (7). The matter may be put briefly in the words of Sugden L. C. in *The Attorney-General* v. *Drummond* (8): "One of the most settled rules of law for the construction of ambiguities in ancient instruments is that you may resort to contemporaneous usage to ascertain the meaning of the deed; tell me what you have done under such a deed, and I will tell you what that deed means." To this must be added the qualification formulated by Lord Cranworth L. C. in *Sadlier* v. *Biggs* (9) in the following terms: "If there is a deed which says, according to its true construction, one thing, you cannot say that the deed means something

(1) (1806) 7 East. 197; 8 R. R. 608.
(2) (1803) 4 East. 327.
(3) (1832) 8 Bing. 178, 181.
(4) [1900] A. C. 260.
(5) (1854) 5 De G. M. & G. 797.
(6) (1869) L. R. 4 Ch. 722. Ap.
(7) (1849) 2 H. L. C. 837, 861, 863.
(8) (1842) 1 Dr. & War. 353, 368.
(9) (1853) 4 H. L. C. 435, 458.

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else, merely because the parties have gone on for a long time so understanding it." In the case before us, the terms of the deed are at best inconclusive, and the Courts below have properly referred to the manner in which the dedicated properties have been held and enjoyed. It appears that within a few years of the grants in favour of Deb Nath Deghoria, the properties were partitioned between him and his brother Shib Nath Deghoria, and on 2nd August and 14th September 1829, the representatives of the two branches of the Deghoria family executed two permanent leases in respect of their different shares. These leases were not challenged for at least 60 years, either by any of the *shebaits* or by the successive Rajahs of Pachete who are intimately concerned in the proper maintenance of the endowment created by one of their ancestors. These leases form the root of the title of the plaintiffs, and the Court will be slow to listen to the suggestion that they were granted by the then *shebaits* in excess of their authority and consequently constituted acts in the nature of breaches of trust. The Courts below have further found that the properties have been throughout held and enjoyed by the Deghorias as secular properties subject to a religious charge, and that while a part of the income has been applied for the performance of the worship of the goddess, the remainder has been used by the members of the family for their own purposes. Under these circumstances, the Courts below have rightly concluded that the properties in dispute are not absolute *debutter* properties of the goddess, but are the personal properties of the Deghorias subject to the charge of the worship of the goddess. In this view, the permanent leases of 1829 are not liable to be impeached, and afford a solid foundation for the title of the plaintiffs.

We may add that on behalf of the respondents it was argued that the question of the true character of the endowment was immaterial, because, as the permanent leases of 1829 have never been impeached, any suit now instituted for cancellation of those leases and for resumption of the properties from the lessees or their representatives would be successfully met by the plea of limitation. This contention is supported by the decision of this Court in *Jagamba Gaswamini* v. *Ram Chandra Goswami* (1), and by that of their Lordships of the Judicial Committee in *Damodar Das* v. *Lakhan Das* (2) as explained in the case of *Madhu Sudan Mandal* v. *Radhika Prosad Das* (3). The permanent leases have consequently become indefeasible by lapse of time, and from this point of view also, there is no answer to the claim of the plaintiffs.

It was faintly suggested that the suit was improperly constituted and that there had been a misjoinder of plaintiffs. The District Judge has pointed out that there is no substance in this contention. But even if the objection were well founded, it would not be a ground for reversal of the decision of the Primary Court under section 99 of the Code of Civil Procedure of 1908, which was in force when the appeal was preferred to the District Judge. It was also sought to be argued that the suit was barred by limitation, treated as a suit for declaration of title, and reference was made to the cases of *Mohabharat Shaha* v. *Abdul Hamid* (4) and *Legge* v. *Rambaran* (5). The suit, however, is essentially one for possession of property, and the plaintiffs are not called upon to ask for cancellation of any execution sale, because no operative sale has ever taken place.

(1) (1903) I. L. R. 31 Calc. 314.
(2) (1910) I. L. R. 37 Calc. 885; L. R. 37 I. A. 147.
(3) (1912) 16 C. L. J. 349.
(4) (1904) 1 C. L. J. 73.
(5) (1897) I. L. R. 20 All. 35.

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The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

G. S. *Appeal dismissed.*

APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

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July 14.

KAILASH CHANDRA NATH

v.

SHEIKH CHHENU.*

Receipt—Registration—Waiver—Evidence—Registration Act (III of 1877), s. 17(n)—Mortgage-bond—Receipt showing simple interest charged—Evidence Act (I of 1872), s. 92.

A receipt, which purports to show that simple and not compound interest was to be charged (though the mortgage-bond contained provision for the payment of compound interest), is admissible in evidence. Such a receipt operates as a full acquittance for the money paid and requires no registration.

Jiwan Ali Beg v. *Basa Mal* (1) followed.

SECOND APPEAL by Kailash Chandra Nath and another, the plaintiffs.

This appeal arises out of a suit for sale on a registered mortgage-bond. The plaintiffs claimed Rs. 1,346 and 14 annas, inclusive of compound interest, the principal amount advanced being Rs. 300 only. The defence was that the provision for payment of compound interest was fraudulently inserted in the

* Appeal from Appellate Decree, No. 1740 of 1912, against the decree of J. A. Dawson, District Judge of Tippera, dated April 11, 1912, affirming the decree of Shyama Charan Chakravarti, Munsif of Brahmanbaria, dated May 8, 1911.

(1) (1886) I. L. R. 9 All. 108.

mortgage-bond, that upon the fraud coming to the knowledge of the defendants they ceased to pay interest: whereupon, the plaintiff Gagan and the father of the plaintiff Kailash received arrears of interest waiving their right to compound interest and gave defendants a receipt for the same. The plaintiffs, thereby, were not entitled to compound interest which they claimed and it was further urged that a sum of Rs. 430, paid as interest on the loan, was not credited to them.

Upon this pleading the following issues were raised:—

(i) Was compound interest payable in view of the subsequent agreement to pay only simple interest?

(ii) Was the plea of payment true?

The learned Munsif passed a modified decree allowing simple interest and ordering a set-off of Rs. 430.

The plaintiffs, thereupon, appealed to the District Judge of Tippera, who dismissed the appeal with costs.

The plaintiffs appealed to the High Court.

Mr. Casperz (with him *Babu Dwarka Nath Chakravarti* and *Babu Birendra Chandra Das*), for the appellant. Both courts have relied on an unregistered receipt for their finding that compound interest was not chargeable though the stipulation as to compound interest is clear and explicit in the registered mortgage.

The receipt, varying a registered mortgage-bond, required registration and is, therefore, inadmissible in evidence for the purpose of proving that simple and not compound interest was to be charged.

The receipt says, "I release you from the liability to pay compound interest as written in the said mortgage-bond. This is clearly inadmissible under

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section 91 of the Evidence Act, since a registered document can only be cancelled or varied by a registered document. Here the unregistered document, namely, the receipt is a modification of the mortgage.

Babu Sasadhar Roy, for the respondent. The receipt does not require registration. There is no release of any properties mortgaged from the lien created by the bond in favour of the plaintiff. It is really a settlement of accounts and the mortgagee may give up or waive his right (if he chose to do so) to compound interest. A receipt requires no registration. The mortgagee might receive the entire mortgage amount including interest and give a valid discharge by an unregistered receipt. Proviso 4 of section 92 of the Evidence Act clearly allows evidence of a subsequent oral agreement to modify an existing contract.

A receipt for payment of money due under a mortgage, when the receipt does not purport to extinguish the mortgage, does not require registration: see section 17 cl. (*n*) of the Registration Act. Even if the stipulation to give up compound interest is invalid, it is not open to the plaintiffs to ask for a decree for compound interest for the period anterior to the date of the receipt. The receipt must mean that the plaintiffs gave up compound interest which, they could undoubtedly do, without a registered document.

Mr. Casperz, in reply. The interest or any part of the interest is also mortgage-money and cannot, therefore, be given up without a registered document.

HOLMWOOD AND CHAPMAN JJ. In this second appeal two questions have been raised, *first*, that the receipt (Ex. A) not being registered could not be admitted in evidence, being a document which purported to affect the terms of the mortgage; and,

secondly, assuming that it could be looked at, the release really means that there is a release of four years for which payment has been made and not a waiver in future.

As regards the first point, we think the matter is concluded by the decision of the Full Bench in *Jiwan Ali Beg* v. *Basa Mal* (1), which has now been enacted into law by clause (*n*) of section 17 of the Registration Act. We therefore think that registration was not necessary and that the receipt operates as a full acquittance for the money already paid.

As regards the question of waiver, the words contained in the document are a clear waiver. They say "be it known that I release you from the liability to pay compound interest as written in the said mortgage bond;" and we can find nothing in the law or in any authority which would require such waiver to be registered; although under the terms of section 92 of the Evidence Act it undoubtedly must be in writing. In the present case this question is rather an academical one, as the difference in the decree would be a matter of about 8 annas. We, therefore, do not think it necessary to disturb in any way the decree of the lower Appellate Court, and the appeal must therefore be dismissed with costs.

S. K. B. *Appeal dismissed.*

(1) (1886) I. L. R. 9 All. 108.

APPELLATE CIVIL.

Before Fletcher and Richardson JJ.

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June 25.

MOHINI MOHAN MISSER

v.

SURENDRA NARAYAN SINGH*.

Injunction—Limitation—Suit for damages for obtaining perpetual injunction maliciously and without reasonable cause—Limitation Act (IX of 1908), Sch. I, Art. 42.

No suit lies for damages against a defendant for, maliciously and without reasonable or probable cause, obtaining a perpetual injunction which was subsequently dissolved on appeal.

Nand Coomar Shaha v. *Gour Sunkar* (1) doubted.

Quartz Hill Mining Co. v. *Eyre* (2), *Smith* v. *Day* (3), *Hari Nath Chatterjee* v. *Mothur Mohun Goswami* (4), *Chander Cant Mookerjee* v. *Ram Coomar Coondoo* (5), *Cotterell* v. *Jones* (6), *Turner* v. *Ambler* (7) referred to.

Under Art. 42, Sch. I of the Limitation Act (IX of 1908) time begins to run from the date when the injunction ceases.

APPEAL by Mohini Mohan Misser and others, the plaintiffs.

This appeal arises out of a suit instituted by the plaintiffs to recover from the defendants Rs. 1,91,932-8-6 as damages for malicious prosecution of a civil suit brought against the plaintiffs.

On the 1st of December 1896, the executor of the father of the defendant No. 1 instituted a suit in the

* Appeal from Original Decree, No. 242 of 1912, against the decree of Ram Lal Das, Subordinate Judge of Purneah, dated March 18, 1912.

(1) (1870) 13 W. R. 305.
(2) (1883) 11 Q. B. D. 690.
(3) (1882) 21 Ch. D. 421.
(4) (1893) I. L. R. 21 Calc. 8; L. R. 20 I. A. 188.
(5) (1874) 22 W. R. 138.
(6) (1851) 11 C. B. 713.
(7) (1847) 10 Q. B. 252.

Court of the Subordinate Judge of Purneah against the present plaintiffs for the purpose of obtaining an injunction restraining the present plaintiffs from erecting an indigo factory on the land let for agricultural purposes and on the same date an application was made *ex parte* to the Subordinate Judge for an interlocutory injunction restraining the defendants, till the trial of the suit, from proceeding with the erection of the buildings. The learned Subordinate Judge granted the interlocutory injunction prayed for. An appeal was preferred against that order to the District Judge who dismissed the appeal.

The suit came on for hearing before the Subordinate Judge on the 30th September 1899. The learned Judge decreed the suit and granted a perpetual injunction restraining the erection of an indigo factory on the land. The present plaintiffs appealed against that decree to the District Judge who on the 16th of August 1900 reversed the decision of the Subordinate Judge and dismissed the suit. The present defendants who were then the plaintiffs in that suit (the original plaintiffs having previously died) preferred an appeal to this Court against the decision of the District Judge. On the 1st of June a Division Bench of this Court reversed the decision of the District Judge and restored the decree passed by the Subordinate Judge. The present plaintiffs then appealed to His Majesty in Council and, on the 1st of June 1907, the decree passed by this Court was set aside and the judgment of the District Judge restored.

The proceedings, having terminated in favour of the present plaintiffs, they brought this present suit to recover damages for malicious prosecution of the suit for an injunction. The learned Subordinate Judge dismissed the suit on the ground that it was barred by limitation.

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Mr. S. P. Sinha (with him *Babu Jogendra Nath Mukerjee*), for the appellants, contended that the suit was not barred under Art. 42 of the Limitation Act and submitted that suit for damages was maintainable upon an order granting injunction if it was sought for and obtained maliciously and without reasonable and probable cause: *Nand Coomar Shaha* v. *Gour Sunkar* (1), *Jit Lal Singh* v. *Raja Kamaleswari Prosad* (2), *Bishnu Singh* v. *A. W. N. Wyatt* (3), and Volume 19 of the Encyclopædia of the Laws of England, pp. 689, 690 and 691.

Dr. Rashbehari Ghose (with him *Babu Golap Chandra Sarkar, Dr. Dwarka Nath Mitra* and *Babu Rishindra Nath Sarkar*), for the respondents, submitted that no suit lay from an order granting injunction. He relied upon *Cotterell* v. *Jones* (4), *Smith* v. *Day* (5), *Quartz Hill* v. *Eyre* (6), *Chunder Cant Mookherjee* v. *Ram Coomar Coondoo* (7), Salmond's Law of Torts (3rd Edition) p. 495.

Mr. Sinha, in reply.

Cur. adv. vult.

FLETCHER J. This is an appeal by the plaintiffs against the judgment of the learned Subordinate Judge of Purneah dated the 18th of March 1912. The suit was instituted to recover from the defendants Rs. 1,91,932-8-6, as damages for malicious prosecution of a civil suit brought against the plaintiffs. On the 1st of December 1896, the executor of the father of the defendant No. 1 instituted a suit in the Court of the Subordinate Judge of Purneah against the present plaintiffs for the purpose of obtaining an injunction restraining the present plaintiffs from erecting an

(1) (1870) 13 W. R. 305.
(2) (1912) 16 C. L. J 555.
(3) (1911) 16 C. W. N. 540, 543.
(4) (1851) 11 C. B. 713.
(5) (1882) 21 Ch. D. 421.
(6) (1883) 11 Q. B. D. 674, 690.
(7) (1874) 22 W. R. 136, 146.

indigo factory on the land let for agricultural purposes and on the same date an application was made *ex parte* to the Subordinate Judge for an interlocutory injunction restraining the defendants, till the trial of the suit, from proceeding with the erection of the buildings. The learned Subordinate Judge on that application granted the interlocutory injunction prayed for. An appeal was preferred against that order to the District Judge who dismissed the appeal.

That suit came on for hearing before the Subordinate Judge on the 30th of September 1899. The learned Judge decreed the suit and granted a perpetual injunction restraining the erection of an indigo factory on the land. The present plaintiffs appealed against that decree to the District Judge who on the 16th of August 1900 reversed the decision of the Subordinate Judge and dismissed the suit. The present defendants who were then the plaintiffs in that suit, the original plaintiff having previously died, preferred an appeal to this Court against the decision of the District Judge. On the 1st of June, a Division Bench of this Court (Banerjee and Pargiter JJ.) reversed the decision of the District Judge and restored the decree passed by the Subordinate Judge. The present plaintiffs then appealed to His Majesty in Council and, on the 1st of June 1907, the decree passed by this Court was set aside and the judgment of the District Judge restored.

The proceedings in this Court are reported in *Surendra Narain Singh* v. *Hari Mohan Misser* (1) and before the Judicial Committee in *Hari Mohan Misser* v. *Surendra Narayan Singh* (2). The proceedings having terminated in favour of the present plaintiffs they have brought this present suit to recover damages for malicious prosecution of the suit

(1) (1903) I. L. R. 31 Calc. 174. (2) (1907) I. L. R. 34 Calc. 718.

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for an injunction. The learned Subordinate Judge has dismissed the suit on the ground that it is barred by limitation. The first question for our decision is—is such an action as the present maintainable? The rule in England is very clear that a suit such as the present cannot be maintained. As was observed by Bowen L. J. in the case of the *Quartz Hill Mining Co.* v. *Eyre* (1), "In the present day and according to our present law the bringing of an ordinary action however maliciously and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution." This general rule is no doubt subject to certain exceptions in case where the proceedings involve "either scandal to reputation or the possible loss of liberty to the person." That the exceptions would not include a suit such as the present is clear. This general rule I think must apply to India except in so far as the same has been modified by statute. Section 95 of the Code of Civil Procedure, 1908, provides: "(*1*) where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last proceeding section,—(*a*) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or (*b*) the suit of the plaintiff fails and it appears that there was no reasonable or probable ground for instituting the same, the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding Rs. 1,000, as it deems a reasonable compensation to the defendant for the expense or injury caused to him." The section also enacts that "an order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction." This section

(1) (1883) 11 Q. B. D. 674, 690.

in effect takes the place of the undertaking in damages which is usually required in England from a plaintiff as a condition of a grant of an interlocutory injunction in a pending suit in his favour, except that under section 95 the damages are limited to Rs. 1,000. The history of such undertaking is given by Jessel M. R. in the case of *Smith* v. *Day* (1).

I now come to the case that has been principally relied upon by the plaintiffs in this appeal; namely, the case of *Nand Coomar Shaha* v. *Gour Sunkar* (2). That case was a reference by a Small Cause Court Judge. The questions referred for the opinion of this Court were, *first*, whether a fresh suit for compensation on account of damages incurred in consequence of obtaining improperly an injunction under section 92 of Act VIII of 1859 can be entertained when the question had been once brought forward for decision before an Appellate Court but rejected on a distinct ground; and, *secondly*, if the suit can be admitted on the ground of its not being decided on its merits by the Appellate Court, is the cause of action to be considered as having accrued from the 18th of August 1868, the date of the decision of the Munsif or from the 23rd of November 1869 when the cross appeal by the plaintiff was dismissed? The learned Judges (L. S. Jackson and Glover JJ.) in answering the questions referred to them remarked that section 96 of Act VIII of 1859 (which for the present purpose is the same as section 95 of the present Code) would not debar the Small Cause Court from entertaining the suit. They do not, however, express any opinion on the question whether the cause of action set up by the plaintiff was or was not a good cause of action although no doubt their judgment implies that the cause of action was sufficient. No authority is cited

(1) (1882) 21 Ch. D. 421. (2) (1870) 13 W. R. 305.

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in the course of the judgment, and the counsel who argued the case before us were unable to cite to us any other authority either in England or in India in which a plaintiff has recovered damages against a defendant who had obtained maliciously and without probable cause an interlocutory injunction. I must confess that the case of *Nand Coomar Shaha* v. *Gour Sunkar* (1) appears to me to be a questionable authority in so far as it decides that a plaintiff can maintain a suit for damages against a defendant for maliciously and without probable cause obtaining an interlocutory injunction. *Nand Coomar Shaha's Case* (1) was decided by this Court on the 30th of March 1870. In the Limitation Act of 1871, first appears Article 86 fixing a period of limitation in which a suit must be brought to recover compensation for damages caused by an injunction wrongfully obtained, the Article in the present Act of 1908 being Article 42. The reason for the insertion of Article 86 in the Act of 1871 was obviously the decision in *Nand Coomar Shaha's Case* (1). But of course nothing in the Limitation Act can give a party a right of suit unless such a right exists independent of the Limitation Act *Hari Nath Chatterjee* v. *Mothur Mohun Goswami* (2). Another case that has been relied upon is the case of *Chunder Cant Mookerjee* v. *Ram Coomar Coondoo* (3). But all that that case decided was that a suit will lie for bringing a suit in the name of a third party maliciously and without reasonable or probable cause whereby the party against whom the action is brought sustains damage. This had already been decided by the Court of Common Pleas in the case of *Cotterell* v. *Jones* (4).

No case has, however, been cited before, or authority shown to, us to suggest that if a party maliciously and

(1) (1870) 13 W. R. 305.
(2) (1893) I. L. R. 21 Calc. 8.
(3) (1874) 22 W. R. 138.
(4) (1851) 11 C. B. 713.

without probable cause brings a suit for a perpetual injunction, and succeeds at the trial but the judgment is reversed on appeal, he is liable in damages for the injury caused by the injunction. Besides, the decision of the Court of first instance granting the injunction would indicate that the suit was instituted under such circumstances as would induce a prudent man to act. The want of probable cause is not to be inferred because of mere evidence of malice: *Turner* v. *Ambler* (1).

The result, therefore, is that there is no case in the books of a suit for damages against a defendant for maliciously and without reasonable or probable cause obtaining a perpetual injunction which was subsequently dissolved on appeal. The only case in which a suit of a similar nature was maintained with reference to an interlocutory injunction, is *Nand Coomar Shaha's Case* (2), the authority of which I think is questionable. But assuming that case to be a binding authority for that proposition, the interlocutory injunction in the present case ceased and came to an end when the Subordinate Judge at the trial on the 30th September 1899 granted a perpetual injunction. The present suit was not instituted until the 13th of May 1910. Under Article 42 of the Indian Limitation Act, 1908, time begins to run from the date when the injunction ceases. Any right of suit that the plaintiffs might have with reference to the obtaining of the interlocutory injunction, is therefore barred by limitation. It is further to be noticed that nowhere in the plaint in this suit is it stated that the suit for an injunction was instituted or prosecuted without reasonable or probable cause. It would appear, however, that the plaintiff's allegations in support of want of reasonable and probable cause are that the

(1) (1847) 10 Q.B. 252. (2) (1870) 13 W. R. 305.

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defendants were actuated by malice and that the suit for an injunction ultimately proved unsuccessful when the decree of this Court was set aside by His Majesty in Council.

Such an allegation, however, is not a sufficient allegation of want of reasonable or probable cause. The fact that the Subordinate Judge granted the injunction and a similar view was taken by a Division Bench of this Court, although their opinion ultimately proved mistaken, shows that it could not be said that there was a want of reasonable or probable cause in instituting and prosecuting the suit: *see* the judgment of Couch C. J. in *Chunder Cant Mookerjee* v. *Ram Coomar Coondoo* (1).

In the result I agree with the conclusion arrived at by the learned Subordinate Judge though for different reasons. The present appeal, therefore, fails and must be dismissed with costs.

RICHARDSON J. I agree that if relief is sought by the plaint on the ground that the previous suit, which was a suit for a perpetual injunction, was instituted maliciously and without reasonable and probable cause, that is not a good cause of action. Paragraph 15 of the plaint, however, points rather to the issue of the interlocutory injunction as the cause of action on which the plaintiffs rely. The interlocutory injunction is treated as though it subsisted up to the date of the order of His Majesty in Council. I agree that the interlocutory injunction was *ipso facto* dissolved by the decree of the first Court granting a perpetual injunction and that assuming that damages may be claimed by suit for "wrongfully" obtaining such an injunction, the present suit, as a suit for damages, is barred by limitation under Art. 42 of

(1) (1874) 22 W. R. 138.

the Schedule of the Limitation Act. As to the word "wrongfully," clause (*2*) of section 95 of the Civil Procedure Code of 1908 seems to contemplate the possibility of a suit being brought to recover compensation in respect of a temporary injunction applied for on insufficient grounds or in a suit instituted without reasonable and probable cause. It is at the least doubtful whether such a suit is maintainable in the absence of an undertaking to pay compensation: *Dhurmo Narain* v. *Sreemutty Dossee* (1). But if it be maintainable, it would no doubt be governed in regard to limitation by Article 42. The conduct imputed to the defendant in such a suit would be in its nature tortuous or wrongful. It is idle to say that the suit could not have been instituted until the determination of the appeal to the Privy Council. The words of Article 42 are clear. Time runs from the date "when the injunction ceases."

In point of substance the damages which the plaintiffs say they have suffered were due principally to the permanent injunction granted by the Court of first instance and the High Court. In view of the result of the appeal to the Privy Council, those decisions must no doubt be regarded as erroneous but as the learned Subordinate Judge points out a party is not liable in damages for procuring an erroneous decision. A successful appellant is entitled under sub-section (*1*) of section 144 of the Code to such restitution "as will, so far as may be, place the parties in the position which they would have occupied" but for the decree which has been varied or reversed. Sub-section (*2*) lays down that no separate suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (*1*). I do not know

(1) (1872) 18 W. R. 440.

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RICHARDSON J.

whether the plaintiffs could have obtained any relief under these provisions. I am disposed to think not. The removal of permanent injunction restored the *status quo ante* so far as it could be restored. But however that may be, at any rate the plaintiffs cannot obtain by suit any relief which they could have obtained under section 144 by application. They cannot in this suit obtain any relief by way of restitution.

The result is that the plaint, whatever construction be put upon it, discloses no cause of action except possibly a cause of action to which the bar of limitation applies.

On the facts, so far as they appear, it would be very difficult to say that the previous suit was instituted without reasonable and probable cause or that the temporary injunction was applied for on improper or insufficient grounds. But, as I understand, we do not decide the appeal with reference to that consideration.

I agree that the appeal should be dismissed with costs.

S. K. B. *Appeal dismissed.*

APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

MAHIM CHANDRA SARKAR

v.

HARA KUMARI DASEE*.

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July 13.

Hindu Law—Will—Construction of will—Devise to widow—Gift-over—Life interest—Absolute gift—Power of appointment—Alienation by gift or sale—Administration suit—Cause of action.

A Hindu testator by his will provided for the performance of certain religious ceremonies and devised all his moveable and immoveable properties to his wife with power to alienate by gift or sale. He also by the same will made a giftover to his daughter in the following terms :—" My daughter Hara Kumari shall become entitled to and possessor of whatever property will remain after your death and she shall enjoy the same keeping up and maintaining the aforesaid *sheba*, etc." The will then went on to say :—" the said daughter shall have the same rights as you have and he to whom my said daughter may willingly give away those properties shall while possessing the same and keeping up and maintaining the *sheba* enjoy them." At his death on the 11th March, 1866, the testator left him surviving his widow and an only daughter, Hara Kumari. The widow, having obtained probate of the testator's will, executed on the 19th May 1898, in favour of her two grand-daughters, Hemangini and Nagendrabala, born some time after the testator's death, a deed of gift of certain properties acquired by her under the said will. On the 30th September, 1898, the widow died. In October, 1899, Mahim Chandra Sarkar, the testator's nephew, dispossessed Hemangini and Nagendrabala of these properties and took possession of the same. On the 8th March, 1908, Hara Kumari, in whose favour the High Court had decided a suit brought by Mahim Chandra Sarkar for the construction of the testator's will and for a declaration of the rights of the parties thereunder (1), executed a deed of gift in favour

* Appeals from Appellate Decrees, Nos. 2597 of 1910, 889 of 1912 and 1318 of 1913, against the decree of S. N. Huda, District Judge of Pabna, dated May 13, 1910, affirming the decree of Durga Kanta Roy, Munsif of Pabna, dated Aug. 24, 1909.

(1) (1908) 11 C. W. N. 412 ; 7 C. L. J. 540.

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of her daughter Hemangini and on the 8th April, 1908, she also executed a similar deed in favour of her other daughter, Nagendrabala, and a *kobala* in favour of Hemangini. In suits brought for administration by Mahim Chandra Sarkar against Hara Kumari, who died during its pendency, for recovery of arrears of rent and cesses in respect of a certain *darpatni* belonging to the estate of the testator, by Mahim Chandra Sarkar against the *darpatnidar* and Hemangini and Nagendrabala and for recovery of possession of certain property acquired by virtue of the deed of gift from the testator's widow, by Hemangini and Nagendrabala against Mahim Chandra Sarkar.

Held, that Mahim Chandra Sarkar had no cause of action and could not maintain the suit for administration.

Held, also, that the testator could make an absolute gift to his daughter who was his reversionary heir in absolute estate and that the gift to her under her father's will was an absolute gift.

Held, also, that there was no power of appointment to the daughter enjoining her to nominate an heir or successor to her father's estate.

Held, also, that the provision for keeping up the *sheba* was merely a collateral charge on the property in whosoever's hands it might be and did not affect the absolute character of the gift.

Brij Lal v. *Suraj Bikram Singh* (1) distinguished.

Moulvi Mahomed Shumsool Hooda v. *Shewukram* (2), *Radha Prasad Mullick* v. *Raneemani Dassi* (3), *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (4), *Mussamut Kollany Kooer* v. *Luchmee Pershad* (5), *Thakur Singh* v. *Nokhe Singh* (6) and *Ramasami* v. *Papayya* (7) referred to.

Held, also, that the *patni* was vested in Hemangini and Nagendrabala by alienation during Hara Kumari's life, that they were Hara Kumari's heirs, the property being *stridhan*, and that Mahim Chandra Sarkar had no title whatever to any of the properties left by Hara Kumari.

Held, also, that the widow had absolute power of alienation in derogation of the rights of the sole reversioner, her daughter, who was only entitled to the residue, that the gift by the widow to Hemangini and Nagendrabala was valid and that Mahim Chandra Sarkar could not plead his right as reversioner against a suit by the heirs of Hara Kumari to eject him as a trespasser, even though the gift should fail.

Hara Kumari Dasi v. *Mohim Chandra Sarkar* (8) referred to.

(1) (1912) I.L.R. 34 All. 405.
(2) (1874) L.R. 2 I.A. 7.
(3) (1908) I.L.R. 35 Calc. 896 ; L.R. 35 I.A. 118.
(4) (1872) 9 B.L.R. 377.
(5) (1875) 24 W.R. 395.
(6) (1901) I.L.R. 23 All. 309.
(7) (1893) I.L.R. 16 Mad. 466.
(8) (1908) 12 C.W.N. 412 ; 7 C.L.J. 540.

Held, further, that the power of alienation, which, though perhaps analogous to what was known as a power of appointment in English law, could not be governed by the rules of English law relating to such appointments.

Bai Motivahu v. *Bai Mamubai* (1) referred to.

SECOND APPEALS by Mahim Chandra Sarkar, the plaintiff in appeals Nos. 2597 of 1910 and 889 of 1912, and Hemangini Dasee and another, the plaintiffs in appeal No. 1318 of 1913.

The facts from which these three appeals arose were as follows. Of two brothers, Mohan Lal Sarkar and Ananda Lal Sarkar, the former had one son, Mahim Chandra Sarkar and the latter one daughter, Hara Kumari. Ananda Lal Sarkar died on the 11th March 1866, at Benares, leaving him surviving his widow, Ichhamoye, and his daughter, Hara Kumari. Prior to his death, on the 10th March, 1866, the deceased had executed a will, under which he disposed of his moveable and immoveable properties in the districts of Pabna, Murshidabad, the 24-Parganas and Benares. After various recitals, in the course of which the testator declared that he was the sole proprietor of his share after partition of certain ancestral property, the owner of an eight anna share of certain self-acquired properties and the sole owner of certain other self-acquired properties, the will went on further to recite that the testator had no male issue, but only a daughter, Srimati Hara Kumari Dasee, and although he had given her in marriage, he felt it his duty to support her, and for this reason he of his own free will and accord in the full possession of his senses, and in sound state of temperament executed this will in favour of his wife. Then followed the operative portion of the will, under which, after making provision for his *sradh* and other religious purposes, the testator bequeathed his properties to

(1) (1897) I.L.R. 21 Bom. 709.

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his wife and made a gift over to his daughter in the following terms: "you will have the right and power to alienate by gift or sale all the aforesaid moveable and immoveable properties. My daughter, Hara Kumari, shall become entitled to and possessor of whatever property will remain after your death and she shall enjoy the same keeping up and maintaining the aforesaid *sheba*, etc." After making certain provisions in the event of his wife dying before the institution of the *sheba*, the testator proceeded to state:—"the said daughter shall have the same rights as you have and he to whom my said daughter may willingly give away those properties shall, while possessing the same and keeping up and maintaining the *sheba*, enjoy them."

On the 24th September, 1885, Ichhamoye applied for and obtained probate of the will in the Court of the District Judge of Pabna and on the 19th May, 1898 she executed in favour of her two grand-daughters, Hemangini and Nagendrabala, born some time after the testator's death, a deed of gift of certain immoveable properties acquired by her under the testators' will. In July, 1898, Mahim Chandra Sarkar, applied for revocation of the will on the ground of forgery. On the 30th September, 1898, while the application was still pending, Ichhamoye died. The application was dismissed on the 24th June, 1904, and Mahim Chandra Sarkar preferred an appeal from that decision to the High Court. In the meantime Mahim Chandra Sarkar brought a suit against Hara Kumari on the 19th July, 1904, at Alipur, in the district of the 24-Parganas, for the construction of the will of Ananda Lal Sarkar and for a declaration of the rights of the parties thereunder in that suit. Hara Kumari preferred an appeal to the High Court. By the time that appeal came on for hearing, Mahim Chandra Sarkar withdrew his appeal in the

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revocation of probate proceeding. The High Court on the 29th January, 1908, gave judgment in Hara Kumari's appeal and allowed the appeal: *Hara Kumari Dasi* v. *Mohim Chandra Sarkar*(1). On the 8th March, 1908, Hara Kumari executed a deed of gift in favour of her daughter, Hemangini. On the 8th April, 1908, she also executed a similar deed in favour of her other daughter, Nagendrabala, and a *kabala* in favour of Hemangini. On the 1st July, 1908, Mahim Chandra Sarkar instituted in the Court of the Munsif at Pabna a suit for administration and account and for the appointment of a receiver, and alleged, that, under the will of Ananda Lal Sarkar, Hara Kumari got only a life interest in the properties of the testator and that on account of her mal-administration, Mahim Chandra Sarkar, as reversionary heir of the testator, was entitled to bring this suit. The defendant contended that she took an absolute interest in the properties in suit under the testator's will after the widow, her mother. This suit was dismissed by the Munsif on the 24th August, 1909, and also on appeal, by the District Judge on the 13th May, 1910. On the 6th August, 1910, Hara Kumari died and two days later Mahim Chandra Sarkar appealed to the High Court, making Hemangini and Nagendrabala parties respondents on the record. This was Appeal No. 2597 of 1910. On the 29th September 1910, Hemangini and Nagendrabala filed a suit against Mahim Chandra Sarkar for recovery of possession of certain property which, it was alleged, was given to Hemangini by deed of gift executed in her favour by Ichhamoye and of which she had been dispossessed by the defendant in October, 1899. It was contended by the defendant that Ichhamoye had not an absolute interest in the properties in question and that after Ichhamoye's death, the

(1) (1908) 12 C. W. N. 412 ; 7 C. L. J. 540.

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defendant as reversionary heir of the testator, was entitled to inherit these properties which formed part of the testator's estate. This suit was dismissed by the Munsif on the 15th September, 1911 and also by the Subordinate Judge on the 21st December, 1912. Hemangini and Nagendrabala thereupon appealed to the High Court on the 18th April, 1913. This was appeal No. 1318 of 1913. On the 19th December, 1910, Mahim Chandra Sarkar filed a suit against one Shashimukhi Chowdhurani, Hemangini and Nagendrabala for recovery of arrears of rent and cess in respect of a certain *darpatni* belonging to the estate of Ananda Lal Sarkar and alleged that he, as heir of Ananda Lal Sarkar, was entitled to the rent of the *darpatni* and that Hemangini and Nagendrabala were preventing the first defendant, who was the *darpatnidar*, from paying him the rent. The defendant's contended that Hemangini and Nagendrabala got the *darpatni* from Hara Kumari, who had absolute right in the property. This suit was dismissed by the Munsif on the 22nd November, 1911 and also by the District Judge on the 28th March, 1912. The plaintiff, thereupon, appealed to the High Court on the 22nd April, 1912. This was Appeal No. 889 of 1912.

Mr. B. Chakravarti (with him *Mr. B. K. Lahiri*, and *Babu Surendra Nath Ghosal*), for Mahim Chandra Sarkar, the appellant in Appeals Nos. 2597 of 1910 and 889 of 1912 and the respondent in Appeal No. 1318 of 1913. The first appeal arose out of a suit for administration on the grounds of waste and alienation. The principal question was one of construction of the will in suit and ascertainment of the rights of the parties upon a proper construction of that will. The defendants respondents could not have any higher rights than what their mother and grandmother had

in the testator's estate. The interest taken by the mother and the grandmother on the basis of the will had already been defined in *Hara Kumari Dasi* v. *Mohim Chandra Sarkar*(1). It was held in that case that the grandmother took a life estate with a power in the nature of a power of appointment. It was further held *that* the mother had the same rights in the properties as the grandmother: see *Mohendra Lal Nandi* v. *Rakhal Das Bishoyi*(2) and *Jitendra Kumar Chattopadhya* v. *Nritya Gopal Mukhopadhya*(3). Their Lordships of the Privy Council construed the provisions of a will similar to those in question in the present suit as conferring only a life estate: see *Brij Lal* v. *Suraj Bikram Singh*(4). This power of appointment could not have been properly exercised in favour of the respondents as neither of them was admittedly born during the lifetime of the testator: see *Bai Motivahu* v. *Bai Mamubai*(5). Moreover, in the absence of express words to indicate an intention to the contrary, a Hindu must be presumed not to intend to devise an absolute estate to a female: see *Moulvie Mahomed Shumsool Hooda* v. *Shewukram* (6) and *Radha Prasad Mullick* v. *Raneemani Dassi* (7). If the will must be construed afresh, then it must be contended that the whole intention of the testator was to create a trust in favour of the *sheba* of the *Thakur*, and that the respondents had no beneficial interest in the estate apart from the *sheba* and the estate would descend to the reversioner.

The appeal No. 889 arose out of a suit for rent in respect of the *darpatni* of one of the properties and it followed the result of the administration suit.

(1) (1908) 12 C. W. N. 412; 7 C. L. J. 54.
(2) (1912) 17 C. L. J. 630.
(3) (1912) 18 C. W. N. 140.
(4) (1912) I. L. R. 34 All. 405; 16 C. L. J. 47.
(5) (1897) I. L. R. 21 Bom. 709.
(6) (1874) L. R. 2 I. A. 7.
(7) (1908) I. L. R. 35 Calc. 896; L. R. 35 I. A. 118.

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The appeal No. 1318 arose out of a suit based upon a deed of gift from the testator's widow to one of the respondents who was not in existence at the death of the testator. This suit was rightly dismissed: see *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore*, (1).

Mr. S. P. Sinha (with him *Dr. Dwarka Nath Mitra*), for the respondents in appeal No. 2597 of 1910. For the purpose of construing the will in suit, it would be unsafe to rely upon the construction put by other Courts on wills: see *Brij Lal* v. *Suraj Bikram Singh* (2). Maclean C. J. in the case of *Hara Kumari Dasi* v. *Mohim Chandra Sarkar* (3) dealt with only a portion of the present will, namely, the widow's interest, as the testator's daughter was then alive and there was no occasion to discuss the latter's interest. Since then the daughter was dead and the whole of the interest under the will must be now construed. According to the Hindu Law the testator's widow must be regarded as having merely the life interest in his estate with a giftover to his daughter, who on the death of the widow, her mother, took an absolute interest in the property which became her *stridhan*. Reliance was placed on s. 82 of the Indian Succession Act which was made applicable to Hindu wills by s. 2 of the Hindu Wills Act, on *Jatindro Mohan Tagore* v. *Ganendra Mohan Tagore* (1) and on the Dayabhaga, Ch. IV, s. I, 23. The gift to a wife stood on a very different footing to a gift to a daughter. Where the former would take an estate for life, the latter would acquire a heritable absolute estate, unless it was cut down by words of limitation. In the case of the wife she must

(1) (1872) 9 B. L. R. 377.
(2) (1912) I. L. R. 34 All. 405; 16 C. L. J. 47.
(3) (1908) 12 C. W. N. 412; 7 C. L. J. 540.

clearly prove that her interest was not limited by express terms under the will. From the fact that this was a gift to a female it would not necessarily follow that an estate for life was created ; nor would the inference lie that the daughter took the same interest as the wife where the gift to the daughter was in the same terms as the gift to the wife: see Trevelyan's Hindu Law, pp. 425 and 505, *Ramasami* v. *Papayya* (1), *Mussamut Kollany Kooer* v. *Luchmee Pershad* (2), *Thakur Singh* v. *Nokhe Singh* (3), *Sreemuttee Sursutty Dassee* v. *Poorno Chunder Roy* (4) *Koonjbehari Dhur* v. *Premchand Dutt* (5), Golapchandra Sarkar Sastri's Hindu Law, 4th Edn., pp. 458 and 460, *Bhobo Tarini Debya* v. *Peary Lall Sanyal* (6), *Saroda Sundari Dassi* v. *Kristo Jiban Pal* (7), *Chundermoney Dossee* v. *Hurry Doss Mitter* (8) and Majumdar's Hindu Wills Act, pp. 193—200. The gift to the daughter was, therefore, an absolute gift and the power of alienation contained in the will cannot be construed into a power of appointment. Powers of appointment must be construed with great reservation under the Hindu Law: see Mayne's Hindu Law, 8th Edn., s. 586.

Dr. Dwarkanath Mitra (with him *Babu Tarakishore Pal Chowdhry*), for the respondents in Appeal No. 889. The will could not be regarded as having created a power of appointment according to English law, and powers of appointment according to English law were not generally applicable to Hindu wills: see *Bai Motivahu* v. *Bai Mamubai* (9). There was no power of appointment in this case for there was

(1) (1893) I. L. R. 16 Mad 466.
(2) (1875) 24 W. R. 395.
(3) (1901) I. L. R. 23 All 309.
(4) (1865) 4 W. R. 55.
(5) (1880) I. L. R. 5 Calc. 684.
(6) (1897) I. L. R. 24 Calc. 646.
(7) (1900) 5 C. W. N. 300.
(8) (1880) 5 C. L. R. 557.
(9) (1897) I. L. R. 21 Bom. 709.

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an absolute right of dispossession in the first instance and the gift over must be held in such cases to have no effect: see *In re Mortlock's Trust* (1) and *Brij Lal* v. *Suraj Bikram Singh* (2).

Babu Mohini Mohan Chakravarti, for the appellants in Appeal No. 1318 of 1913. The claims of the appellants for recovery of possession of certain property, of which they had been dispossessed, was founded on a gift from their grandmother, the testator's widow. The sole question, whether the gift was valid, turned on the construction of the will. Under the will the widow had power to alienate the property either by sale or by gift and as donees the appellants were entitled to recovery and possession.

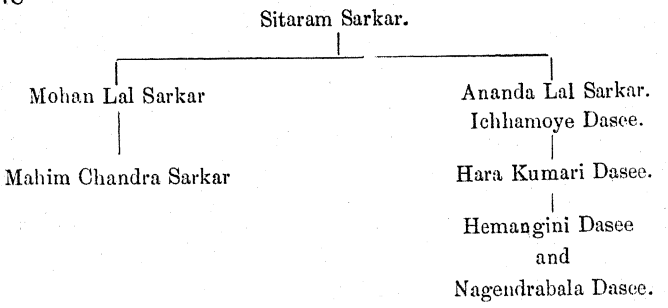
Mr. B. Chakravarti, in reply. The text of the Dayabhaga referred to on behalf of the respondents in appeal No. 2597 of 1910 was also referred to in the course of the argument in the case of *Radha Prasad Mullick* v. *Raneemani Dassee* (3); but their Lordships still held against any absolute interest passing to the daughters. There could not be a fresh construction of the will each time. There must be some finality in these matters. The decision of the Privy Council in *Brij Lal* v. *Suraj Bikram Singh* (2) applied to the present case which was identical with that case.

Cur adv. vult.

HOLMWOOD AND CHAPMAN JJ. The question that arises in these three second appeals is principally one of interpretation of the will of one Ananda Lal Sarkar which has already been partially construed by a Bench of this Court in the case of *Hara Kumari Dasi* v. *Mohim Chandra Sarkar*(4). The position of the

(1) (1857) 3 K. & J. 456.
(2) (1912) I. L. R. 34 All. 405; 16 C. L. J. 47.
(3) (1908) I. L. R. 35 Calc. 896; L. R. 35 I. A. 118.
(4) (1908) 12 C. W. N. 412; 7 C. L. J. 540.

parties can be seen from the following genealogical table—



Ananda Lal Sarkar died on the 11th March 1866. His widow Ichhamoye died on the 30th September 1898. Mahim Chandra Sarkar filed a suit against Hara Kumari on the 19th July 1904 for the construction of the will of Ananda Lal, after withdrawing his suit for revocation of probate but still setting up very prominently that the will was a forgery. Maclean C. J. in the opening of his judgment said: "If the suit had come before me, I should have dismissed it summarily; but as the revocation proceedings have been withdrawn, the Court will deal with the question of the construction on the merits." He appears to have held that but for the giftover to Hara Kumari, the will would have given the widow an absolute estate. Though there is no clear and absolute gift to the widow in the first portion of the operative clause of the will, the words "you will have the right and power to alienate by gift or sale all the aforesaid moveable and immoveable properties," would make it difficult to say that the widow did not take the property absolutely. The giftover to the daughter, however, follows in the following term:—"my daughter Hara Kumari shall become entitled to and possessor of whatever property will remain after your death:"—the words are *satyaban dakhalkar*, or literally, possessor with title,—"and she shall enjoy the

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same keeping up and maintaining the aforesaid *sheba*, etc." Later on he says, "the said daughter shall have the same rights as you have, (it should be equal rights), and he to whom my daughter may willingly give away those properties shall while possessing the same and keeping up and maintaining the *sheba* enjoy them". We have put this last clause rather more literally than in the translation in the report of the case in the books, because on this turns one of the main contentions that the whole will was a devolution in trust for the sole purpose of keeping up the *sheba* and provided merely maintenance for the daughter,

The question before the Court in that case was what interest did the widow Ichhamoye take. The question before us now is what interest did the daughter, Hara Kumari, take, and that question does not appear to have been gone into in the previous case. The Court, however, held that the widow took for life with power of alienation; but to the extent to which such power was not exercised the daughter took the property with equal rights to those conferred on the widow.

On the 8th March 1908, Hara Kumari executed a deed of gift in favour of her daughter, Hemangini, and on the 8th April 1908 a similar deed in favour of Nagendrabala. On the same date she also conveyed a *patni* to Hemangini.

On the 1st July 1908 Mahim Chandra Sarkar instituted the administration suit against Hara Kumari on the ground of waste and it is out of this suit that appeal 2597 of 1910 arises. On the death of Hara Kumari in August 1910, her daughters remained on the record as respondents having been brought on previously as assignees of the property during her life time. On the 29th September 1910 Hemangini and Nagendrabala

filed a suit to recover possession of the property on the basis of a gift to Hemangini by her grandmother Ichhamoye. This is the subject of appeal 1318 by Hemangini against whom the lower Courts decided that Ichhamoye only having a life interest could not make a gift to a person not in existence at the time of her husband's death and that the property therefore on her death went to the reversioner. On the 19th December 1910, Mahim Chandra Sarkar filed a rent suit against the *darpatnidars* of Hemangini making Hemangini and Nagendrabala parties. Out of this the appeal 889 arises.

We will deal with the main question first, which is what interest did Hara Kumari take under her father's will. To decide this it is necessary to go more fully into the will than was done by this Court on the previous occasion. The learned Judge in the lower Appellate Court has somewhat light-heartedly held in the appeal in the administration suit that under the construction put by this Court in 1908 upon the will the present defendant takes the estate absolutely, holding as we have seen erroneously that the judgment in that case was exhaustive. But it is obvious that no question of the nature of Hara Kumari's estate was either raised or decided in that case. The sole question before the Court was the nature of the widow's estate.

Turning therefore to the will itself we find that the testator clearly recites that the family had ancestral zemindari in Pabna district, that there were seven brothers of whom the testator and Mohan Lal Sarkar, the father of the present appellant, alone survived, that one brother died childless and the names of the widows of the other four are given together with the minor son of one of them. He then recites that on the 11th Ashar of the current year they determined their shares in equal parts and after putting them into writing they

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are in enjoyment separately and that the testator with money acquired in his service as *sheristadar* had purchased certain *taraf* (estate) and gave 2 annas share of the said estate to his brother Mohan Lal, six-annas share to the brother's widow who had a son and reserved the remaining eight annas share of his own self acquired property to himself. He then recites that he has also acquired by his own exertions money by service with which he had acquired two *pucca* houses at Bhowanipur, Calcutta, the Murshidabad property where he was the *sheristadar*, and Government paper, etc., etc., in which his brother, his nephew or his brother's widows have no concern. He then proceeds to recite that he has no male issue but only a daughter named Hara Kumari, and although he has given her in marriage he felt it his duty to support her. For this reason he executes this will in favour of his wife Ichhamoye; and then follow the terms which have already been discussed and which appear to us to amount to an absolute gift as far as the daughter is concerned, whether it be regarded from the point of view of the clear provisions of Manu and the Dayabhaga that a gift to a daughter makes the property her *stridhan* and the principle that the bequests of a Hindu will follow the Hindu law of gift, or whether it be regarded as a life estate to the widow with remainder to a single living daughter with no limitation to her ownership except the charge on the estate to keep a certain *sheba* or religious endowment.

Against this view three main contentions are taken: *first*, that the Privy Council has modified the rule of the Dayabhaga by laying down in more than one case that a Hindu must be presumed not to intend to allow his estate to descend in the female line unless there are express words to indicate such intention; *secondly*, that there is a power of appointment given to the

daughter enjoining her to transmit the estate to some unknown person, and if that person was not living at the time of the testator's death the estate goes to the reversioners; and, *thirdly*, that the whole object of the will was to create a trust in favour of the *sheba* and that the respondent had no beneficial interest in the estate apart from the *sheba* which reverts on her death to the reversioner.

Reliance is placed for the plaintiff appellant upon the case of *Brij Lal* v. *Suraj Bikram Singh* (1) which, it is contended, is on all fours with this case. A more clearly distinguishable case can hardly be imagined, for there the lady was given no estate in terms and she was vested with the power of appointing an heir to the testator either in her life-time or by will. There, as the Judicial Commissioners pointed out, the words of the disposition to the two ladies are identical. Here they are markedly and, in our opinion, intentionally different, and as the learned Judicial Commissioners pointed out in order to ascertain the intention of the testator former wills cannot be looked at. All we can derive from the consideration of cases concerning other wills are principles of construction applicable to all wills. One of these principles which is cited by the Judicial Commissioners in the rule of the Privy Council in *Moulvie Mahomed Shumsool Hooda* v. *Shewukram* (2), is that in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with regard to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and it may be assumed that as a general rule at all events

(1) (1912) I. L. R. 34 All. 405; 16 C. L. J. 47.

(2) (1874) L. R. 2 I. A. 7.

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women do not take an absolute estate of inheritance which they are enabled to alienate.

But what are the facts we have here? The recitals as to the nature of the property in the will are not disputed, although it is faintly suggested that there was no actual partition. The major portion of the property is not ancestral. It is the separate property of the testator. He says that his object was to make provision for his daughter. She was then married, but too young to have children; subsequent to his death she had two daughters. He had therefore every reason to hope she might have sons, and he must be presumed to have known as a Judge's *sheristadar* that a bequest by a father to a daughter is under the Hindu law an absolute estate, and by his conferring an absolute power of alienation on the daughter subject to the *sheba*, he must have intended contrary to the general presumption and practice of Hindus to confer an absolute right of inheritance on the daughter. We cannot hold that, when their Lordships of the Judicial Committee speak of a general rule in connection with Hindus' knowledge that women do not take an absolute estate of inheritance which they are able to alienate, they meant a rule of Hindu law; since we know that the rule of Hindu law with regard to gifts to mothers and daughters is the reverse. The judgment delivered in the Judicial Committee by Sir Andrew Scoble in the case of *Radha Prasad Mullick* v. *Raneemani Dassee* (1) does not carry the contention any further since he merely cites with approval the previous *dictum* of the Privy Council in *Moulvie Mahomed Shumsool Hooda* v. *Shewukram* (2) and found that in the case then before their Lordships the testator had clearly succeeded in showing that

(1) (1908) I. L. R. 35 Calc. 896; L. R. 35 I. A. 118, 128.

(2) (1874) L. R. 2 I. A. 7.

his daughters were not to have more than what is generally known to be a woman's estate in his property. On the principles laid down by Wills J. in the case of *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (1), a daughter being a person to whom the testator can under the Hindu law give an estate of inheritance, if the will shows that it was intended that she should have the estate of inheritance a benignant construction is to be used even if the language is ungrammatical or mistaken as to name or description, or in any other manner incorrect provided it sufficiently indicates what was meant, that meaning shall be enforced to the extent and in the form which the law allows. It is idle to contend that the use of the words "a man" in the judgment excludes females whom the Hindu law allows to take such bequests. There is no universal presumption with regard to mother or daughter that in every case the estate she takes is less than would be taken by a male: see *Mussamut Kollany Kooer* v. *Luchmee Pershad* (2), *Thakur Singh* v. *Nokhe Singh*(3), *Ramasami* v. *Papayya* (4). In the case of *Bai Motivahu* v. *Bai Mamubai* (5), their Lordships of the Judicial Committee held that decided cases too numerous to be now questioned have determined that the testamentary power exists, and may be exercised at least within the limits which the law prescribes alienation by gift *inter vivos*. The case was in many respects similar to the present case, and their Lordships say it appears to them to follow from the first taker (who is the widow) being allowed to have only a life interest that her possession is sufficient to complete the executory bequest which follows the gift for life.

(1) (1872) 9 B. L. R. 377, 395.
(2) (1875) 24 W R. 395.
(3) (1901) I. L. R. 23 All. 309.
(4) (1893) I. L. R. 16 Mad. 466.
(5) (1897) I. L. R. 21 Bom. 709.

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It is sought to distinguish this case, because there was a power of demise by will given to the daughter. But the only distinction is that in consequence of such power being given, the daughter did not take an absolute estate; but there was no principle of Hindu law which stood in the way to prevent the testator from substituting his daughter for himself as the person empowered to designate a person who was alive at the time of the testator's death. In the will before us we can find no such power to designate an heir to the testator. The daughter has absolute power, subject to the trust, to alienate the whole property to whomsoever she please. This is an absolute estate which takes effect on the death of the life tenant. We find, therefore, that there is nothing in the decision of the Privy Council to derogate from the rule of Hindu law that the father can make an absolute gift to his daughter, and that there was no power of appointment to the daughter enjoining her to nominate an heir or successor to her father's estate, and thirdly that the provision for keeping up the *sheba* was merely a collateral charge on the property in whosoever's hands it may be and did not affect the absolute character of the gift. That being so the plaintiff calling himself the reversioner has no cause of action and cannot maintain the suit for administration against the respondent.

But it is argued that the *shebaitship* passes by law to the reversioner on the death of the last *shebait*. This point cannot arise in this appeal since the suit for administration was brought in the lifetime of Hara Kumari; nor do we think that any specific estate was devised for the purpose of the alleged *sheba*. It is evident from the will itself and from the translation cited by Maclean C. J. in his judgment that there were several pious intentions which the testator classed

together as *shebas*. No specific sum is assigned to any of them and the injunction appears to go no further than the expenditure of a reasonable amount on them. These objects were no doubt a charge on the property; but the property was not left in trust for those objects alone, nor can the reversioner in face of the lady holding an absolute estate sue either herself or her heirs for administration of the property as trust property.

The appeal No. 2597 of 1910 therefore must be dismissed with costs.

Appeal No. 889, which arises out of the rent suit against the *darpatnidars* of Hara Kumari's daughters brought on the record after her death, must be dismissed on the same considerations, *first*, because the *patni* is vested in the defendants by alienation during Hara Kumari's life, and, *secondly*, because they are Hara Kumari's heirs, the property being *stridhan* and the plaintiff had no title whatever to any of the properties left by Hara Kumari. Appeal No. 889 of 1912 must therefore also be dismissed with costs.

As regards appeal No. 1318 of 1913, the case is somewhat different. There the respondent Mahim Chandra Sarkar has got possession of the property which was given to Hemangini by her grandmother Ichhamoye who had only a life interest. But upon the death of Ichhamoye the property did not revert to Mahim Chandra Sarkar as the reversioner of her husband because he had already made a valid bequest of it to his daughter Hara Kumari. She was therefore the sole reversioner and the property being vested in her and having descended to her heirs their title cannot be extinct if they sue within 12 years of her death or within 12 years of Mahim Chandra Sarkar's assumption of adverse possession. It is therefore necessary to see when the plaintiffs were dispossessed. This was in Kartik 1306 corresponding

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to October 1899. They brought their suit on the 29th September 1910 well within 12 years of their dispossession.

The error committed by the lower Courts in deciding this suit appear to us to be that they erroneously held that the defendant Mahim Chandra Sarkar was the reversionary heir of Ichhamoye's husband Ananda Lal Sarkar. Admittedly, this appeal depends like the others on the question of the construction of Ananda Lal's will, and if Hara Kumari was Ananda Lal's reversionary heir in absolute estate as has been held in the other cases, it is clear that the defendant respondent can have no title whatever as reversioner to Ananda Lal's estate. The estate vested in Hara Kumari and has descended to the plaintiffs and the defendant is a pure tresspasser.

The only difficulty is that they claimed possession on the basis of the gift from Ichhamoye which, it is said, failed on her death, if the estate Ichhamoye took was the ordinary estate of a Hindu widow. But we agree with Maclean C. J., that the estate she took was something more than this and that there is no reason why she should not take the life interest *plus* the power of alienation which, though perhaps analogous to what is known as a power of appointment in English law cannot be governed by the rules of English law, relating to such appointments. The Privy Council in *Bai Motivahu* v. *Bai Mamubai* (1) expressly says that there is no application of the English law of powers to Hindu wills. In ordinary life-estates of Hindu widow, the gift of the widow would be taken not from her but from the testator; but here she had absolute power of alienation in derogation of the rights of the sole reversioner her daughter who was only entitled to the residue. It

(1) (1897) I. L. R. 21 Bom. 709.

would be idle to say that all alienations which Ichhamoye may have made to strangers of her own free will are recoverable by the defendant respondent as reversioner.. They are recoverable if at all only by Hara Kumari and her heirs.

We think, on the construction we have put on the will, the gift to Hemangini and her sister was valid and that the defendant respondent cannot plead his right as reversioner against a suit by the heirs of Hara Kumari to eject him as a trespasser, even though the gift by which they originally obtained title should fail. Before they brought the suit they had added to it a better title which concludes the defendant who has no title whatever. To hold otherwise would be to interpret the will in one sense in two of these appeals and in different sense in the third.

For all these reasons, Appeal No. 1318 of 1913 is decreed and the plaintiffs are declared to be entitled to recover whatever portion of the property claimed appertains to the estate of Ananda Lal Sarkar as set out in the will unless it had already passed out of the estate before the date of the gift. To decide these questions it is necessary to remand the case to the lower Court for a decision on issues Nos. 9 and 15 which were not decided by the judgment in appeal. The lower Appellate Court will decide these issues if there is evidence on the record in regard to them, otherwise it will itself take such evidence or cause it to be taken by the Court of first instance and make a decree according to the directions contained in this judgment that the plaintiffs do recover the lands to which they may be entitled under our judgment with costs in proportion to their success.

O. M.

Appeals Nos. 2597 of 1910 and 889 of 1912 dismissed.

Appeal No. 1318 of 1913 allowed.

PRIVY COUNCIL.

P.C.*
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March 30, 31;
April 3, 7,
28, 29;
July 22.

EKRADESHWAR SINGH
v.
JANESHWARI BAHUASIN.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Hindu Law—Custom—Babuana and sohag grants—Proof of Custom—Custom excluding females from succession in Darbhanga Raj family estate—Custom of exclusion not only from succession to Raj, but extending to succession in collateral branches of family—Custom effective notwithstanding partition had taken place in family branch.

In a suit by one of two brothers in a junior branch of the family of the Darbhanga Raj (an estate governed by the rule of male lineal primogeniture) against the widow of the other brother for possession of her deceased husband's property, on the ground that widows were by the custom of the family wholly excluded from succession, not only to the Raj itself, but also in the collateral branches of the family :—

Held, that there was on the evidence a valid custom established in the junior branch of the family to which the parties belonged that widows did not inherit *babuana* properties, and that the succession in the case of *sohag* grants was governed by the same custom as governed the succession in the case of *babuana* grants. The custom applied in this case notwithstanding a separation and partition of the property which had been effected between the plaintiff and his brother ; and consequently on his brother's death the plaintiff became entitled to such of the estate of his deceased brother as consisted of *babuana* and *sohag* properties, together with accretions which had been made to the former property.

Held, also, that the custom was strongly supported by instances in the family of widows, who would otherwise have been entitled to a Hindu widow's interest, having been excluded from, or not having claimed, possession of property on the death of their husbands ; and that the custom being proved to be well-established could not, under the circumstances, be defeated by the fact that in one instance, as the evidence showed, it was not enforced.

* *Present :* LORD MOULTON, LORD PARKER OF WADDINGTON, SIR JOHN EDGE AND MR. AMEER ALI.

Words used in the *babuana* and *sohag* grants, "*auras putra poutradik*," were held not to be words of general inheritance which would include female as well as male heirs, but words of limitation consistent with the custom which excluded females from succession under *babuana* and *sohag* grants which could not be made under the ordinary Hindu (in this case the Mithila) law.

Ram Lall Mookerjee v. *Secretary of State for India* (1) referred to.

APPEAL 50 of 1912 from a judgment and decree (2nd August 1909) of the High Court of Judicature at Calcutta, which reversed a judgment and decree (15th August 1908) of the Court of the Subordinate Judge of Bhagalpur.

The plaintiff was the appellant to His Majesty in Council.

The suit giving rise to this appeal was brought to recover certain *babuana* and *sohag* properties of the plaintiff's deceased brother, Janeshwar, from the respondent that brother's widow as defendant by virtue of a kulachar or custom existing in the Darbhanga Raj family by which females are excluded from inheritance.

The custom alleged by the plaintiff was that the Raj descends according to the rule of lineal primogeniture to the eldest son of the last holder, while to the other sons are given properties called *babuana* grants for their maintenance and support, and that in the event of the Raja dying without any male issue natural or adopted, his younger brother, and in the absence of a brother his nearest agnate, succeeds to the Raj to the exclusion of widows and other females; that the *babuana* properties, though granted to a younger brother, always stand in the name of the Maharaja for the time being, he being recorded in the Collectorate as the proprietor, so that the properties remain part and parcel of the Raj; that the Maharaja

(1) (1881) I. L. R. 7 Calc. 304 : L. R. 8 I. A. 46.

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for the time being pays the Government revenue and other public demands with respect to the properties granted, and he, in his turn, realises the same from the grantee or his successor in the male line, and, on extinction of heirs of the grantee in the male line, the properties granted, and all acquisitions made from the income thereof revert to the Raj; that by virtue of the custom, in the event of the death of any male descendant in the male line of any grantee to whom the *babuana* grant has been made without any male issue, natural or adopted, his nearest agnate from among the male descendants in the male line succeeds to the *babuana* grant with all accretions thereto.

With regard to *sohag* properties (grants to female members of family) the rule of succession, it was alleged, is the same as that of *babuana* grants the villages granted to females of the Raj family descend to the males of their bodies in the male line, and similarly on failure of male issue, those villages revert to the Raj.

The plaintiff's case is that he and his brother Janeshwar Sing inherited from their father Maharaj Kumar Babu Nitreshwar Singh the *babuana* properties granted to him, and also acquisitions made out of the income of the said *babuana* properties; that their mother, Netrobati Bahuasin, was given some properties called *sohag* properties at the time of her marriage which devolved upon them at her death; that she died on 29th March 1879, and Nitreshwar Singh, her husband, died on 31st July 1883; that the two brothers, the plaintiff and Janeshwar, were minors, and their properties during their minority were managed and looked after by the late Maharaja of Darbhanga, Sir Lachmeshwar Singh; that the plaintiff on attaining majority took over the management of the properties of both himself and his brother including

the *sohag* properties which at that time belonged jointly to them; that after Janeshwar Sing attained his majority, the brothers, in consequence of disagreement between them, separated and divided the properties, including *sohag*, but without prejudice to their coparcenary right as junior members of the Darbhanga Raj family; that Janeshwar Singh died on 18th April 1906, without any male issue, leaving only his brother the plaintiff, and his widow, Janeshwari Bahuasin, the defendant; and that according to the kulachar or family custom observed in the Darbhanga Raj family and also in those of the branches thereof, the defendant had no right or title to the estate left by her husband, and the plaintiff as the surviving male heir in his own branch of the family of the Darbhanga Raj, was entitled to succeed to, and to the possession of the estate left by the defendant's husband, Janeshwar Singh.

The defendant's case was that though there was a kulachar or family custom affecting the succession to the Darbhanga Raj itself, there was no such custom which governed or affected the devolution or succession of or to *babuana* or *sohag* properties, and that they were governed in this case by the Mithila school of Hindu law; that there was no kulachar or family custom in the family of the Darbhanga Raj by which females, either widows or daughters, or heirs in the female line were excluded from succession to *babuana* properties, or that the succession thereto was restricted to heirs male, or that on the extinction of such heirs, the property reverted to the Raj. The defendant contended that *babuana* properties were separate self-acquired properties, and not ancestral, in the hands of the original grantee, and were subject to alienation by him by will, and stated that Nitreshwar Singh by his will, dated 31st July 1883 devised all

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his said properties, including both the *babuana* and *sohag* properties with accretions thereto purchased by him, to his two sons, the plaintiff and Janeshwar Singh, in equal shares. She contended also that the effect of the partition between the plaintiff and her late husband was to make entirely separate the properties respectively allotted to each of them; that no kulachar or family custom attached to them; and that she, as the heiress of her husband, was entitled to the said properties, and that the suit ought therefore to be dismissed.

The Subordinate Judge found that Nitreshwar Singh held the properties in suit under a *babuana* grant from the Raja of Darbhanga; and held "that there is a valid custom in the junior branches of the Raj family, including the branch to which the parties to the suit belong, that widows do not inherit *babuana* properties"; and "that there is a *kulachar* governing the succession and inheritance to *sohag* property just the same as in the case of *babuana*." He was of opinion that the will of Nitreshwar was invalid, and that it was immaterial that the plaintiff and Janeshwar took from the executor under the will. But he found as a fact that there was a complete separation between the brothers, and consequently held that the plaintiff's claim to succeed by right of survivorship was ill-founded; but that "this does not affect the plaintiff's right to succeed on family custom, which overrides the ordinary rule of succession." As to any lands purchased since 1850 he held that they were governed by the same rules as those comprised in the grants to Nitreshwar Singh and his wife.

Appeals to the High Court both by the plaintiff and the defendant were preferred against the Subordinate Judge's decree, and were heard by SHARFUDDIN and RICHARDSON JJ., who agreed with the Subordinate

Judge that the plaintiff and Janeshwar were completely separated in interest before Janeshwar's death, and that the plaintiff could not consequently succeed by survivorship. They held that the evidence adduced on the part of the plaintiff, which they discussed in detail, did not prove that there was any family custom with regard to *babuana* properties in general, nor any customary incident attached to the lands in suit which would exclude a widow from inheriting the separate estate of her husband. They also pointed out that the plaintiff had failed to prove that the terms of the grant to Nitreshwar Singh in any way supported his claim. In that view it became immaterial to consider any question as to the devolution of the property under the will of 1883, or as to the distinction between the various classes of the lands claimed. The High Court also found it unnecessary to consider either the objections taken on behalf of the defendant to the admissibility of much of the evidence relied upon by the Subordinate Judge, or the evidence given on her behalf.

In the result the defendant's appeal was allowed and the plaintiff's appeal and suit were dismissed.

On this appeal,

Sir H. Erle Richards, *K. C.*, and *A. M. Dunne*, for the appellant, contended that the kulachar or family custom alleged was fully established by the evidence on the record; that it governed the succession to both *babuana* and *sohag* properties, and all the accretions thereto; and that the partition of the said properties between the appellant and his brother did not displace or affect the custom as a rule of succession in the Darbhanga Raj family. Both *babuana* and *sohag* properties descended only in the male line, and could be held only by males by the custom of the Raj.

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Reference was made to *Gunesh Dutt Singh* v. *Mohesh-war Singh* (1). The evidence showed that the properties could not be held by a female: if there was a failure of male heirs entitled to hold them, the properties reverted to the Raj The grant of property as *babuana* to a junior member of the family did not change the property from being ancestral, nor make it self-acquired; and the grantee was not entitled to alienate it in such a manner that it could not revert to the Raj on failure of male heirs: *Ram Chandra Marwari* v. *Mudeshwar Singh* (2) was referred to. The respondent says there is nothing which covers the case of the widow of a separated brother, but the appellant contends that the custom if proved applies to the collateral branches of the family as well as to the direct line, and would exclude all females from inheriting. Any partition, moreover, could not have the effect of a partition under the ordinary Hindu law, but could only be an arrangement between the males then being maintained by the grant, always subject to the reversion of the property to the Raj: see *Durgadut Singh* v. *Rameshwar Singh* (3) and *Lalit-eswar Singh* v. *Bhubeswar Singh* (4). The partition in the present case was explained as having been made for the convenience of the brothers. Instances in the family were referred to in which the alleged custom had been observed; and in which widows who, had there been no such custom, would have been entitled to and would have obtained possession of a widow's interest in property, had been excluded from or had not claimed any such interest on the death of their husbands. Ghanlata's case was a departure from the custom. She might have been given maintenance

(1) (1855) 6 Moo. I. A. 164.
(2) (1906) I. L. R. 33 Calc. 1158.
(3) (1909) I. L. R. 36 Calc. 943, 952: L. R. 36 I. A. 176, 181.
(4) (1908) I. L. R. 35 Calc. 823.

but she was allowed to have possession of the property. Her admission in the ekrarnama which she executed that she had no right to inherit was, it was submitted, an admission of the custom, though she had held contrary to it. She was allowed to hold by sufferance and not by right. It was not an abandonment of the custom, but a revival of it by the same person who broke it. The respondent had not given in evidence any instances where a widow, a daughter, or a daughter's son had inherited *babuana* or *sohag* property.

The High Court, it was contended, had wrongly excluded as inadmissible the deposition of the late Maharajah Sir Lachmeswar Singh given in the case of *Ramanundun Singh* v. *Janki Koer* (1) as to the existence of the custom alleged; that evidence was, it was submitted, admissible under section 13 of the Evidence Act (I of 1872). The evidence was discussed as to the custom, and, on the question whether the property in dispute descended by the custom or by the ordinary Hindu law, it was contended that the custom was sufficiently established by the evidence. Hindu law was based on custom: if a custom was established in any family or district it was Hindu law, so far as that family or that district was concerned. *Ramakanta Das Mahapatra* v. *Shamanand Das Mohapatra* (2) was referred to. The judgment of the Subordinate Judge should be restored.

DeGruyther, *K. C.*, and *Kenworthy Brown*, for the respondent, contended that the High Court had rightly found that the custom excluding females was not proved, and the decision to the contrary of the Subordinate Judge was based greatly on inadmissible evidence. The respondent's right of inheritance was

(1) (1902) I. L. R. 29 Calc. 828: L. R. 29 I. A. 178.

(2) (1909) I. L. R. 36 Calc. 590: L. R. 36 I. A. 49.

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not excluded by any family custom, or by any customary incident attaching to the land, or by the conditions on which the grants were made. The Darbhanga Raj was an estate governed by the rule of primogeniture, that is, it was held by a single male heir, and was for that reason impartible: *Gunesh Dutt Singh* v. *Moheshur Singh*(1) was referred to. The *babuana* and *sohag* grants were for the maintenance of the junior members of the family, as the younger sons or brothers of the Maharajah, who did not succeed to the Raj. Such grants were made in satisfaction of all clams to maintenance, and any one who had such a grant held the property granted just as any other heir to do what he liked with. It remained in name part of the Raj property, but the grantee had, subject to that, an absolute estate in it, and was governed by the ordinary Hindu (in this case the Mithila) law; and the property did not remain ancestral but became self-acquired. As to the difference between ancestral and self-acquired property, reference was made to Mayne's Hindu Law (7th Ed.), page 333, paragraph 270, page 343, paragraph 275 and page 731, paragraph 540. The fact that by custom females were excluded from succession to the Raj, did not necessitate that such a custom was applicable to *babuana* or *sohag* property granted to a junior member of the family for maintenance. There was not the same reason for it, as in the case of the Raj itself. The custom, it was submitted, was not binding on a collateral branch when the members of it were joint. Such a custom had never been so applied, and to make it applicable it would have to be proved like any other custom. The property granted as *babuana* and *sohag* was subject to be partitioned as had been done in this case. Every member of the grantee's

(1) (1855) 6 Moo. I. A. 164.

family had a right to claim partition: see Mayne's Hindu Law (7th Ed.), page 632, paragraph 469. There was also a right of alienation as to which Mayne's Hindu Law, 7th Ed., page 415, paragraph 321, was referred to. Even if it were not partible, it was not necessarily inalienable: see *Durgadut Singh* v. *Rameshwar Singh* (1); and the same case before the High Court, *Rameshwar Singh* v. *Jibender Singh* (2). There was no suggestion in the present case that the property was inalienable: any one contesting it must show a custom prohibiting alienation. Reference was made to *Laliteswar Singh* v. *Bhabeswar Singh* (3); and *Ram Chandra Marwari* v. *Mudeshwar Singh* (4) which showed that *babuana* property could be taken in execution of decree. Where there has been a separation and partition in a branch of the family, as in the present case, there is nothing, even if the custom was proved as to the succession to the Raj itself, to show that a widow of a separated brother may not hold the property for a widow's estate. That, in fact, was done by Ghanlata in whose case in the Darbhanga family the alleged custom was not enforced. It is because in the absence of any custom, that is, by the ordinary Hindu law, the widow would succeed, that the appellant has set up a custom to exclude her; why the custom, if it existed, was not enforced in Ghanlata's case is not shown; it amounted, it was submitted, to a deviation from, if not an abandonment of the custom: Ghanlata's admission should not be taken as supporting the custom. Reference was made to *Rama Kanta Das* v. *Chowdhry Shamanand Das* (5). Objection was made to the

(1) (1909) I. L. R. 36 Calc. 943, 952: L. R. 36 I. A. 176, 182.
(2) (1905) I. L. R. 32 Calc. 683.
(3) (1908) I. L. R. 35 Calc. 823.
(4) (1905) I. L. R. 33 Calc 1158.
(5) (1909) I. L. R. 36 Calc. 590: L. R. 36 I. A. 49.

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admissibility as evidence of certain documents such as depositions, petitions, pleadings and judgments in other suits, sanads and letters, among them the deposition of the late Maharaja of Darbhanga, Sir Lachmeswar Singh, and of the present Maharaja Sir Rameshwar Singh; and the Evidence Act (I of 1872) sections 13, 21 and section 32, sub-section (*4*); and *Miller* v. *Madho Das* (1) were referred to. It was also contended that the terms of the *babuana* and *sohag* grants were such as not to exclude females from inheriting. The words used were "*auras putra poutradik*," equivalent to "from generation to generation," and they were, it was submitted, to be interpreted as being words of general inheritance which would include female heirs as well as male heirs; and the case of *Ram Lal Mookerjee* v. *Secretary of State for India* (2) was cited. The onus of establishing the custom was on the appellant. Property may be impartible and yet women be entitled to inherit; and the general law must prevail unless a custom excluding females has been proved: see *Ram Nundun Singh* v. *Janki Koer* (3). The instances cited for the appellant and claimed as having been observances of the custom, and therefore, strong evidence of it were discussed, and it was contended that they were not sufficient to establish the custom set up. As to the nature of customs and how they must be proved, and every deviation from the ordinary Hindu law be established as a custom, reference was made to Mayne's Hindu Law (7th Ed.), page 58 and page 758, paragraph 527: *Neelkisto Deb Barmono* v. *Beer Chunder Thakoor* (4); *Muhammad Kamil* v. *Imtiaz*

(1) (1896) I. L. R. 19 All. 76, 92: L. R. 23 I. A. 106, 116.
(2) (1881) I. L. R. 7 Calc. 304: L. R. 8 I. A. 46.
(3) (1902) I.L.R. 29 Calc. 828, 852: L. R. 29 I. A. 178, 193.
(4) (1869) 12 Moo. I. A. 523, 541.

Fatima (1); and *Garuradhwaja Prasad* v. *Superundhwaja Prasad* (2). The High Court, it was submitted, rightly held that the custom set up was not established.

Sir Erle Richards, *K. C.*, in reply, referred to the Evidence Act (I of 1872) section 157 as to corroboration of witness by proof of former statement made by him as to the same fact: *Mohesh Chunder Dhal* v. *Satrughan Dhal* (3) per Lord Macnaghten. Women have been excluded who would have inherited under the ordinary Hindu law; and that was by the custom now set up. [*De Gruyther*, *K. C.*, referred to *Sheo Partab Bahadur Singh* v. *Allahabad Bank* (4), as to the devolution of woman's property (stridhan)]. Trevelyan's Hindu Law, pages 430, 439; and Evidence Act (I of 1872), sections 13, 32, 48 and 49. [SIR JOHN EDGE referred to section 68 as to proof of a document requiring attestation. MR. AMEER ALI referred to Ameer Ali and Woodroffe's Law of Evidence (4th Ed.), page 219, that evidence of the statements of a deceased person as to a custom in a family must, to be admissible, have been made before any controversy arises on it]. It was submitted that the custom alleged had been proved, and the terms of the sanad were also relied on as supporting it. One case against the custom was not sufficient to destroy it.

The judgment of their Lordships was delivered by

July 22.

SIR JOHN EDGE. The suit in which this appeal to His Majesty in Council has arisen was brought on the 20th December 1906, in the Court of the Subordinate Judge of Bhagalpur, by Babu Ekradeshwar Singh,

(1) (1909) I. L. R. 31 All. 557: L. R. 36 I. A. 210.
(2) (1900) I. L. R. 23 All. 37, 51: L. R. 27 I. A. 238, 251.
(3) (1902) I. L. R. 29 Calc. 343: L. R. 29 I. A. 62, 68.
(4) (1903) I. L. R. 25 All. 476: L. R. 30 I. A. 209.

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who is the appellant here, against Musammat Janeshwari Bahuasin, who is the widow of the plaintiff's younger brother, Babu Janeswar Singh. The plaintiff and his brother were sons of Netreshwar Singh, who was younger son of Maharaja Rudar Singh of Darbhanga.

The plaintiff claimed a declaration that he was entitled to the properties in suit which were owned by and in the possession of his deceased brother, a decree for possession of those properties, for mesne profits, and other reliefs. The property claimed consisted of the share which the plaintiff's brother had obtained on a partition between them of immovable property which had been granted by a *babuana* grant to their father, of immovable property which had been granted by a *sohag* grant to their mother, of immovable property alleged to be accretions to the *babuana* property, and of accumulations. The plaintiff's claim was based on an alleged custom in the family of the Darbhanga Raj by which widows and other females were excluded from all rights to the possession of lands held under *babuana* grants or *sohag* grants. It was alleged by the plaintiff that the properties which had been purchased by his father and by his brother had been purchased with profits which had been derived from the *babuana* property and were to be treated as accretions to that property. The defendant, who was in possession, denied the existence of any such custom and by her written statement put the plaintiff to proof of his title to possession.

The Darbhanga Raj is an ancient and impartible Raj, and by the kulachar, or family custom, the right of succession to the gaddi and to the properties of the Raj Reasat descends according to the rule of lineal primogeniture. The younger sons of a Maharaja of

Darbhanga are styled Babus, and by the Kulachar each younger son is entitled by way of a *babuana* grant to a portion of the Raj Reasat for the maintenance of himself and his male descendants in the male line, and the wife of a younger son of a Maharaja of Darbhanga gets, by way of a *sohag* grant, the usufruct of a portion of the Raj Reasat for the maintenance of herself and her male descendants in the male line. In each case the property, village or villages, granted, continues to form part of the Raj Reasat, from which it is never separated; it is entered in the Government Revenue Registers under the name of the Maharaja for the time being of Darbhanga as the proprietor, and the property so granted reverts to the Maharaja for the time being of Darbhanga on the failure of male descendants in the male line of the grantee. *Babuana* grants and *sohag* grants differ essentially in their nature from absolute grants, and are subject to the kulachar under which they are authorised and in accordance with which they are made. The family of the Darbhanga Raj are Hindus, and, except in so far as customs of the family and its branches exist and apply, the members of the family are governed by the Mithila School of Hindu law, which, so far as it applies to this case, may be taken as following the Mitakshara of the Benares school.

Maharaja Rudar Singh of Darbhanga, by a *babuana* grant granted to his son Babu Netreshwar Singh by way of maintenance as *babuana*, the *dehat milkiat* appertaining to pergunnah Nisankhpur Kusha together with *dasturat malikana*. That grant has not been put in evidence in this suit, but the fact that the grant was made is proved by a sanad, dated 7th Phagun Badi 1257, which was granted by Maharaja Rudar Singh to his eldest son Maheshwar Singh. That sanad was registered in the registry of Mozuffarpur

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on the 13th February 1850. The sanad shows that *babuana* grants had also been made by Maharaja Rudar Singh to two other of his younger sons, and contains the following directions :—

"The said Maharaja Kumar Babus shall continue in possession of the said pergunnahs, and the Government revenue, which shall be due on account thereof, will be paid by them to you, and you will pay the same to the Government along with the Government revenue of the Raj. The said Babus shall live in a style befitting the positions of Babus, and you shall treat them according to your sense of propriety as a Raja, and in a manner befitting their position as Babus."

On the death of Maharaja Rudar Singh, his eldest son Maheshwar Singh succeeded to the gaddi and the Raj Reasat, and became Maharaja of Darbhanga. Maharaja Maheshwar Singh by a sanad, dated 6th Aghan Sudi 1259 Fasli (A.D. 1852), granted to Bahuasin Sohagin Mouzah Madhapur as a *sohag* gift. As translated in this record the sanad contains the following clause :—"You and your sons and grandsons, &c., shall cultivate or get cultivated the mouzah aforesaid, and enjoy the usufruct thereof yourself." Bahuasin Sohagin was the wife of Babu Nitreshwar Singh and the mother of the plaintiff, and of his late brother. She is referred to in the record as Musammat Netrobati Bahuasin.

The plaintiff's mother died in 1879. His father died in 1883, when the plaintiff and his brother were minors. Until the separation of the brothers and a partition between them, the effect of which will later be considered, the plaintiff and his brother were coparceners in the *babuana* property, which, according to Hindu law, was in their joint possession ancestral property, subject, however, to such family custom as applied to it. Similarly, the *sohag* property was ancestral property in which, at the time of the separation and partition, the plaintiff and his brother

were coparceners. The plaintiff came of age in 1888, and was put in possession of the *babuana* property and the *sohag* property as manager for the family consisting of himself and his brother. The younger brother came of age in 1896. Soon after the younger brother came of age disputes arose between the brothers, they separated and each brought a suit against the other to obtain partition of the property in which they were coparceners. Decrees for partition were made, and in 1900 the property was partitioned between the brothers.

The younger brother died without issue on the 18th April 1906, leaving surviving him his wife, who is the defendant to this suit. On her husband's death she took possession of the property which he held at the time of his death. Her right to the possession of that property is disputed in this suit on the ground that by a family custom she as a widow, although entitled to money maintenance, was excluded from any right to the possession of that property.

The kulachar or family custom under which the plaintiff claimed is thus described by him in his plaint:—

"1. That the family, to which the plaintiff and the defendant's husband belong, has held from time immemorial the properties known as Raj Reasat of Darbhanga, and constituting an impartible Raj, and is governed by the kulachar, or family custom, in the matter of succession and inheritance as hereinafter mentioned.

2. That by such kulachar and family custom, females, either widows or daughters and heirs in the female line, are altogether excluded from succession.

3. That so far as the said Raj Reasat is concerned, the same descends according to the rule of lineal primogeniture on the eldest son of the last holder, the other sons obtaining portions of the Raj for maintenance and support by way of *babuana* grants.

4. That in the event of the last holder of the said Raj dying without male issue, natural or adopted, his younger brother, or, in the absence of brother, his nearest agnate, according to the rule of lineal

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primogeniture, succeeds to the said Raj to the exclusion of widows and other females.

5. That the incidents of the said *babuana* properties are, that the name of the Maharaja Bahadur of Darbhanga for the time being stands recorded in the Government Register as the proprietor of the mouzahs comprised in the said properties, and it remains a part and parcel of the said Raj, and the Babus holding the said properties pay the Government revenue and other public demands payable in respect of the said mouzahs to the said Maharaja who pays the same to Government; and that the said Babus and their male heirs in the male line remain in possession and enjoyment of the said mouzahs; and that on the extinction of the heirs male of the grantees in the male line, the said mouzahs together with all acquisitions, movable and immovable, made from the income thereof, revert to the said Raj.

6. That by virtue of the kulachar aforesaid and the incidents of the said *babuana* grants, on the death of any male descendant in the male line of any Babu or younger scion of the said Raj family to whom a *babuana* grant as aforesaid has been made, without male issue, natural or adopted, his nearest agnate among the other male descendants in the male line of the said grantee succeeds to his share in the said *babuana* grant together with all accretions thereto as aforesaid.

7. That in accordance with the custom of the family of Raj Darbhanga usufructs of some village or villages out of the Raj properties are granted to females of the family on the occasion of their marriages or other ceremonies. The rule of succession and other incidents connected therewith are the same as that of *babuana*; the villages granted to them descend to males of their body in unbroken male line; and on the extinction of male issue the said village or villages revert to the Raj."

The plaintiff put forward the following as an explanation of the separation and partition between him and his brother:—

"16. That after the husband of the defendant attained majority, and in consequence of disagreement between him and the plaintiff, they separated and divided amongst themselves the major portion of the aforesaid properties and *sohag* property merely for the sake of convenience, and undisturbed enjoyment of usufruct without prejudice to their co-parcenary rights as junior members of the Raj Darbhanga family; but they being of junior branch of the Darbhanga Raj family, their status as co-parceners in the Darbhanga Raj family did not come to an end, nor did such partition in any way affect or alter the nature and incident of their tenure of the said grant.

17. That the husband of the defendant died on the 18th April 1906 without any issue, and leaving plaintiff his full brother, and the defendant his widow.

18. That according to the kulachar or family custom referred to above obtaining in the Darbhanga Raj family, including the junior branches thereof, the defendant has no right or title to the estate left by her husband ; and the plaintiff as the surviving male heir in the family of the grantee Maharaj-kumar Babu Nitreshwar Singh and also as a co-parcener in the Darbhanga Raj family, is entitled to succeed to and to the possession of the estate left by the husband of the defendant, representing his share of the said grant and accretions thereto ; and that the defendant is only entitled to suitable maintenance out of the same ; and that she is not entitled to succeed to and possess the said estates, properties and effects as is falsely pretended by her."

It may be observed that a separation between members of a joint Hindu family followed by a partition between them of the ancestral property which would not put an end to their coparcenary rights in the property is unknown to the law. As the plaintiff was a party to the suits in which the decrees under which the partition was effected were made he is not in a position to deny as against his brother's widow that partition did in fact take place. He may, however, have intended by his plaint to represent that the partition between him and his brother had not the ordinary legal effect of a partition between coparceners, and that the custom of the Darbhanga Raj family which would exclude widows from the succession when the members of a branch remained joint, would equally apply to exclude the widow of a separated member of a branch.

The Subordinate Judge found, as the fact was, that there had been complete separation between the brothers in food, worship, and estate, and consequently that at the time of the death of the younger brother in 1906 the plaintiff had no coparcenary interest in any of the property in suit. The correctness of that

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finding has not been questioned in this appeal. The Subordinate Judge also found that there is a valid custom in the junior branches of the family of the Darbhanga Raj, including the family to which the parties to the suit belong, that widows do not inherit *babuana* properties, and that the succession and inheritance in the case of *sohag* grants are governed by the custom which governs the succession and inheritance in the case of *babuana* grants, and he held that notwithstanding that there had been complete separation between the brothers the custom applied. He gave the plaintiff a decree for possession of some of the immovable properties which the plaintiff claimed, for certain moveable property and for mesne profits. From that decree the defendant, the respondent here, appealed to the High Court of Judicature at Fort William in Bengal. The learned Judges before whom the appeal came found that although the subjects of *babuana* and *sohag* grants would, on the failure of male heirs in the male line of the grantee, revert to the Maharaja of Darbhanga for the time being, the plaintiff had failed to prove any custom by which the widow of a childless and separated Babu was not entitled during the continuance of a *babuana* or *sohag* grant to hold for a Hindu widow's interest the property which her separated husband had held under a *babuana* or *sohag* grant, and, consequently, applying the rules of the ordinary Hindu law, those learned Judges decided that the plaintiff had failed to prove as against the defendant that he was entitled to the possession of any of the property in suit, and by their decree set aside the decree of the Subordinate Judge and dismissed the suit. From that decree this appeal to His Majesty in Council has been brought.

Some statements deposed to by witnesses who were called, and some of the documents which were put in

were not admissible as evidence in this suit. It seems to have been overlooked at one period of the suit that evidence, oral or documentary, as to statements of a deceased person as to the custom in a family is not admissible if it appears that such statements were made after a controversy as to the custom had arisen. There is, however, abundant evidence to prove what was the custom in this family of the Darbhanga Raj which applied to *babuana* grants and *sohag* grants and to accretions to *babuana* immoveable property.

Their Lordships are of opinion that the Subordinate Judge arrived at a correct conclusion on the evidence that the custom governing the succession to and the inheritance of *sohag* property is the same as the custom governing the succession to and the inheritance of *babuana* property. In the High Court, Mr. Justice Richardson held that *sohag* property is similar in its nature and incidents to *babuana* property, and is governed by similar considerations, and Mr. Justice Sharfuddin did not dissent from that view. Their Lordships find that, except that a *babuana* grant is made to a male while a *sohag* grant is made to a female, there is no difference so far as the right to succession to the property is concerned between a *babuana* grant and its incidents and a *sohag* grant and its incidents. In the one case the grant is made for the benefit of the grantee and his male descendants in the male line, in the other case the grant is for the benefit of the grantee and her male descendants in the male line; in each case, females, widows and daughters and the descendants of daughters are by the custom applying to such grants excluded from the succession, and on the failure of such male descendants in the male line the property granted reverts to the Maharaja of Darbhanga for the time being. The general evidence as to custom upon which their Lordships

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have found that widows are excluded from the succession to *babuana* and *sohag* properties, includes and is strongly supported by instances in this family of Darbhanga of widows, who would otherwise have been entitled to a Hindu widow's interest, having been excluded from, or not having claimed, possession on the death of their husbands.

In some of the *babuana* sanads which are in evidence in this suit the words which have been regarded in the Court below as words of limitation are in the vernacular *auras putra poutradik*. As to those sanads, Mr. Justice Sharfuddin in his judgment in this case said :—

"From the copies of sanads (Exhibits 20A, 20B, 20C, 20D, and 20E) it is clear that female children and daughters' sons were excluded from the inheritance of the *babuana* properties. The expression used in the sanads are *auras putra poutradik*, which means sons born of the loins. I take it to mean that so long as there is one descendant of this description, the properties granted are not to revert to the Raj."

That construction is consistent with the evidence as to those *babuana* grants to which their Lordships attach importance, and their Lordships are unable to regard them as words of general inheritance which would include female as well as male heirs. In this connection the attention of their Lordships has been drawn to the judgment of this Board in *Ram Lal Mookerjee* v. *The Secretary of State for India in Council* (1) in which it was held that in Bengal in a gift to a man the vernacular words *putra poutradi krame* would be read as words of general inheritance, and would include female as well as male heirs where by law the estate would descend to such heirs. *Babuana* grants could not be made under the ordinary Hindu law, but they are authorised by the custom which excludes females from the succession. Their

(1) (1881) I. L. R. 7 Calc. 304 : L. R. 8 I. A. 46.

Lordships must regard the words *auras putra poutradik* as used in these sanads as words of limitation consistent with the custom, and not as words of general inheritance.

Their Lordships having found that under the custom which applies to the branches of this family widows are excluded from all right to succeed to *babuana* property or to *sohag* property, it is necessary to consider whether that custom, which has been proved to apply where the members of the branch remain joint, can, without evidence that it has been applied where the members of a branch have separated in food, worship, and estate, be held to exclude the widow of a childless and separated member from a Hindu widow's interest in the *babuana* and *sohag* properties which had been held by her husband as his separate property. In this case it is clear that until the brothers separated the *babuana* and *sohag* properties were held by them, subject to the terms of the grants and the custom, as joint ancestral property in which their rights were those of coparceners.

The right under the Mitakshara of coparceners in Hindu ancestral property to have the joint property partitioned is now unquestionable unless the property is held under a grant, or is subject to a custom, which expressly or impliedly prohibited any partition of the property which would have the effect of defeating the object of the grant or the custom. It has been contended that there can be no partition of *babuana* or of *sohag* property in this family of Darbhanga, and that to allow that *babuana* and *sohag* property could be partitioned would be to frustrate the very object with which *babuana* grants and *sohag* grants have been made and the very object with which the custom in the family of the Darbhanga Raj authorised the making of such grants by the Maharaja for the time

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being of Darbhanga, that object being to provide by a grant of lands suitable maintenance, having regard to the position of the family, for the grantee, and his or her male descendants in the male line, and to relieve the Maharaja of Darbhanga from the possibility of having from to time time to provide for such descendants' maintenance by gifts of money.

In support of the contention that there can be no partition of *babuana* property reference has been made to the judgment of this Board in *Durgadut Singh* v. *Rameshwar Singh* (1).

That case related to a *babuana* grant in this family of Darbhanga. Their Lordships in that case stated that those who for the time being are entitled to be maintained out of *babuana* property " cannot have it divided amongst them by proceedings in the nature of partition." The statement referred to, although doubtless correct, cannot be regarded as an authority binding in this appeal, as it was made upon a concession as to facts which were not proved, and which certainly would not be proved by the evidence in this suit. The concession which was made by counsel in that case was that lands which had been granted to Kirkat Singh by a *babuana* grant descended to the eldest male heir of the grantee to be held, or managed, by the person to whom they descended for the maintenance of the family. The evidence in this suit proves that *babuana* and *sohag* lands descend in the family of Darbhanga, not to one male heir only, but to all the existing male heirs in the male line of the grantee as coparceners.

Apart from the general evidence that females are excluded from the succession to *babuana* and *sohag* properties there is little evidence, and that apparently merely evidence of opinion, that the rule as to the

(1) (1909) I. L. R. 36 Calc. 943 : L. R. 36 I. A. 176.

exclusion of females from a succession applies where there has been a partition. It is probable that there have been few instances in this family of Darbhanga of a separation in food, worship and estate in which this question as to the right of a female to succeed to *babuana* or *sohag* property could have arisen. It is doubtful that with the exception of the present case and the case of Musammat Ghanlata, who was the widow of Babu Ghansham Singh, there has been any case in which a separated and sonless member of a branch of the Darbhanga family had a wife who survived him.

Musammat Ghanlata's case occurred in a branch which descended from Maharaja Madho Singh, from whom the present Maharaja of Darbhanga descended through Maharaja Rudar Singh who made the *babuana* grant in this case. Ramput Singh, who was a younger son of Maharaja Madho Singh, had a Babuana grant; he had six sons, one of whom was Dharamput. Dharamput had by his wife Dharamlata a son Ghansham Singh, who had by his wife Musammat Ghanlata two daughters but no son. Ghansham's daughters married and had male issue. Ghansham Singh separated from his uncles and cousins and obtained possession of his father's sixth share of the *babuana* property of that branch. On Ghansham Singh's death his widow Musammat Ghanlata entered into possession of his one-sixth share of the *babuana* property as hers by right of inheritance, and in the presence and with the knowledge of the agnates of her deceased husband she was registered as the proprietor of that one-sixth share, and held possession of it for 16 years until she died. A few days before she died Mussammat Ghanlata executed an ekrarnama in which she stated that by custom she had no title to the share, and alleged that she had been permitted to hold

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possession of it merely by way of maintenance. It is obvious that she executed the ekrarnama as a compromise to secure, if possible, 400 bighas of the lands for her grandsons, who were sons of her daughters. No explanation satisfactory to their Lordships of the reason why Musammat Ghanlata was allowed to take and to hold possession of her late husband's one-sixth share, and why the custom was not enforced in her case, has been forthcoming. It is possible that, owing to the novelty of the position, the parties who were concerned were in some doubt as to their rights under the custom. However that may have been, their Lordships are of opinion that a well-established custom in the family cannot be defeated by the fact that in one case the custom was not enforced. The subsequent history of Ghansham's one-sixth share, so far as it is known to their Lordships, is inexplicable.

Their Lordships hold that the custom in this family of the Darbhanga Raj by which females are excluded from the succession to *babuana* property and to *sohag* property applies in this case notwithstanding the separation and the partition which was effected by the plaintiff and his late brother, and consequently that on the death of his brother the plaintiff became entitled to the possession and enjoyment of the *babuana* property and of the *sohag* property which his brother held at the time of his death. Their Lordships agree with the Subordinate Judge, for the reasons stated by him, that the immoveable properties which were acquired from the income and profits of the *babuana* properties are to be considered as accretions to the *babuana* properties, and they hold that the plaintiff became, on his brother's death, entitled to the possession and enjoyment of those immoveable properties. Their Lordships are not satisfied that the plaintiff proved a title to the possession of any of the

movable property or accumulations which he claimed. The defendant was and is entitled to money maintenance, and as no substantial offer of adequate maintenance was made, their Lordships consider that the claim for mesne profits should be disallowed.

Their Lordships will humbly advise His Majesty that the decree of the High Court should be set aside; that the appellant should have a decree for the possession of the immoveable properties in suit excepting Nos. 15, 19, and 21 of Schedule 3, and No. 10 of Schedule 4(A), and that in other respects the decree of the Subordinate Judge should be varied by dismissing the suit; that it be declared that the respondent is entitled to be paid monthly during her life, unless the property reverts in the meanwhile to the Maharaja of Darbhanga for the time being, future maintenance at the rate of Rs. 15,000 per annum, such maintenance to be a charge upon the immoveable properties which the appellant will recover by the order in this appeal; and that no costs be allowed to either side in the High Court or in the Court of the Subordinate Judge.

Their Lordships consider that if the appellant and his brother had not effected a partition, this litigation might have been avoided. No costs of this appeal will be allowed to either side.

Appeal allowed.

Solicitors for the appellant: *W. W. Box & Co.*

Solicitors for the respondent: *T. L. Wilson & Co.*

J. V. W.

CRIMINAL REFERENCE.

Before Jenkins C.J., and Teunon J.

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Sep. 9.

EMPEROR

v.

SURATH.*

Commitment—Duty of Magistrate to examine witnesses not produced but whom the accused is prepared to produce after process—Application to summon witnesses and for time to file documents made after the commitment order—Criminal Procedure Code (Act V of 1898), s. 208—Practice.

A Magistrate is bound, before passing an order of commitment, to examine all the witnesses produced by the accused but not those whom he is prepared to produce after process obtained for their appearance.

Queen-Empress v. *Ahmadi* (1) referred to.

Emperor v. *Muhammad Hadi* (2) dissented from.

A Magistrate does not act illegally, under s. 208 of the Criminal Procedure Code, in refusing an application for summons on witnesses and for time to file documents, made after the order of commitment has been passed.

IN the course of a preliminary inquiry in a sessions case, held by the Sub-divisional Officer of Kishengunge, the prosecution witnesses were examined and cross-examined and the prosecution case closed on the 17th June 1914, and the Magistrate made the following order "I shall go through the record and pass the necessary orders tomorrow." On the next day an application was filed, apparently after the order of commitment to the Sessions Court had been passed, on behalf of the accused, praying the Court to

* Criminal Reference, No. 174 of 1914, by N. K. Dutt, Sessions Judge of Purnea, dated July 18, 1914.

(1) (1898) I. L. R. 20 All. 264. (2) (1903) I. L. R. 26 All. 177.

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summon some defence witnesses, a list of whom was offered to be put in at once, and to allow reasonable time for the filing of certain documents. The Magistrate, thereupon, recorded an order in these terms. "Accused are committed to the Court of Sessions to-day, no further adjournment can be allowed."

The case came on for trial before the Sessions Judge of Purneah, on the 18th July, when the accused took objection to the order of commitment as illegal, having regard to the provisions of s. 208 of the Criminal Procedure Code. The learned Judge, accepting the contention, referred the case to the High Court under s. 438 of the Code. The material portions of the Letter of Reference are as follows:—

"At the enquiry, prosecution witnesses were examined and cross examined, and the prosecution witnesses were finished on 17th June 1914, and the Court passed the following order:—"I shall go through the record and pass necessary orders tomorrow." On the following day, that is, the 18th June 1914, a petition on behalf of the accused was filed praying for examination of a few witnesses, a list of whom was to be filed at once, and to allow a reasonable time for filing documents. The Court ordered as follows:—"Accused are committed to the Court of Sessions to-day. No further adjournment can be allowed."

I think the order of commitment was wholly illegal. Under section 208 (*1*) of the Criminal Procedure Code it was imperative upon the Magistrate to take all evidence as might be produced on behalf of the accused, under the same section, sub-section (*3*), the Magistrate should issue process to compel the attendance of any witness or the production of any document, if the prosecution or accused applies for the same, unless for reasons to be recorded he deems it unnecessary to do so. The Magistrate cannot refuse to issue summons to compel the attendance of witnesses because he thinks that the case must be committed to the Sessions, for before coming to the conclusion that a case should be committed to the Sessions, he should weigh the evidence of both sides that might be adduced.

If he considers that the accused should be discharged on the evidence adduced on behalf of the prosecution, or if he thinks that the accused is guilty of grave *laches* in praying for summoning of witnesses, and for such other reason to be recorded, he may refuse to summon witnesses for the defence. It might be that after examining the witnesses for the

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defence and considering the documents filed on behalf of the accused, the Magistrate might come to the conclusion that the accused committed no offence, or committed an offence that should not be tried by the Court of Sessions. So in this case the Magistrate was bound to issue summons to compel the attendance of witnesses on behalf of the accused under section 208 of the Code of Criminal Procedure. As he did not do so the order of commitment was wholly illegal. The case of *Emperor* v. *Muhammad Hadi* (1) supports this view. The case of *Phanindra Nath Mitra* v. *Emperor* (2) cited by the Public Prosecutor, is not in point, as the accused in that case did not care to cross-examine the witnesses for the prosecution as their examination went on. So I think the order of commitment was illegal, and I, therefore, recommend that it may be quashed by the Hon'ble High Court under section 215 of the Criminal Procedure Code."

Mr. K. N. Chaudhuri and *Babu Manmatha Nath Mukherji*, for the accused.

No one appeared for the Crown.

JENKINS C.J. This is a Reference to the High Court by the Sessions Judge of Purnea, under section 438 of the Criminal Procedure Code, and the suggestion is that the law as prescribed in section 208 of the Criminal Procedure Code has not been observed. That view has been supported before us by Mr. Chaudhuri who has cited in support of it a decision in *Emperor* v. *Muhammad Hadi* (1). That case does not purport to go beyond the decision on which it is based, that is to say, the decision in *Queen-Empress* v. *Ahmadi* (3). But in fact it does enlarge the rule laid down in that case, in so far as it applies the rule in the earlier case, which was limited to witnesses produced, to witnesses whom the accused might be prepared to produce, and this enlargement is in conflict with the express terms of section 208. I cannot myself see that the Magistrate has in any way failed to observe the provisions of that section. It is not suggested that he did not hear all

(1) (1903) I. L. R. 26 All. 177. (2) (1908) I. L. R. 36 Calc. 48.
(3) (1898) I. L. R. 20 All. 264.

the evidence produced before him, and that is all that is required by the first paragraph. The fact that an application was made on the date on which the accused was committed to the Sessions for the summoning of further witnesses appears to me to introduce no conditions which show that the provisions of that section had not been observed. It is important to notice that what was sought was that the Magistrate should allow reasonable time for filing documents and summoning witnesses. On that the Magistrate made the order that "the accused are committed to the Court of Sessions to-day; no further adjournment can be allowed." The application, therefore, was obviously too late for the commitment had been made. More than that, I think, in the circumstances of this case, that the accused is not deserving of any great sympathy because an application could have been made at once to this Court, under section 215, for the quashing of the commitment if the circumstances permitted it. But instead of doing that the accused waited until the case was called on at the Sessions and took this point a month after the event. In my opinion, we ought not to uphold this Reference, and we direct the Sessions Judge to proceed with the trial of the accused.

TEUNON J. I agree.

E. H. M.

CRIMINAL REVISION.

Before Jenkins C.J., Fletcher and Teunon JJ.

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Oct. 23.

FAUJDAR THAKUR

v.

KASI CHOWDHURY.*

Acquittal—Revision—Practice—Interference by High Court in revision with an order of acquittal on the application of a private party—Criminal Procedure Code (Act V of 1898), s. 439.

The High Court has jurisdiction, under s. 439 of the Criminal Procedure Code, to set aside an order of acquittal, but it has now become a settled practice that it will not ordinarily interfere, in revision in such cases, at the instance of a private prosecutor.

Queen-Empress v. *Shekh Saheb Badrudin* (1), *Heerabai* v. *Framji Bhikaji* (2), *Thandavan* v. *Perianna* (3), *Queen-Empress* v. *Ala Bakhsh* (4), *Queen-Empress* v. *Prag Dat* (5), *In the matter of Sheikh Aminuddin* (6), *Qayyum Ali* v. *Faiyaz Ali* (7), *In re Municipal Committee of Dacca* v. *Hingoo Raj* (8) and *Deputy Legal Remembrancer* v. *Karuna Baistobi* (9) followed.

Rakhal Das Roy v. *Kailash Banu* (10) explained by Jenkins C.J.

THE facts of the case are briefly as follows. On 4th April 1913, one Ram Khelawan Tewari, a local zamindar, got a sale deed relating to certain land in village Hatharua executed in his favour by one Musammat Paltu. He made some attempts to take possession of the same by instituting cases in the Criminal

* Criminal Revision No. 1201 of 1914, against the order of W. H. Lewis, Subdivisional Magistrate of Samastipur, dated June 20, 1914.

(1) (1883) I. L. R. 8 Bom. 197.
(2) (1890) I. L. R. 15 Bom. 349.
(3) (1890) I. L. R. 14 Mad. 363.
(4) (1884) I. L. R. 6 All. 484.
(5) (1898) I. L. R. 20 All. 459.
(6) (1902) I. L. R. 24 All. 346.
(7) (1900) I. L. R. 27 All. 359.
(8) (1882) I. L. R. 8 Calc. 895.
(9) (1894) I. L. R. 22 Calc. 164.
(10) (1909) 11 C. L. J. 113.

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Courts against the party of Hari Chowdhury but failed. On the 15th March 1913, an information was lodged at the thana by his servant, Faujdar Thakur, stating that on the day previous he (the informant) and seven men had gone on the land (covered by the deed) to cut the *rahar* crop growing thereon, and that when he had reaped the ripe *rahar* and loaded it on a cart, an armed body of men consisting of Hari Chowdhury and others, 30 or 35 in number, attacked and wounded his companions. Hari Chowdhury and 22 others were placed on trial, under s. 148 of the Penal Code, before Mr. Lewis, the Subdivisional officer of Samastipur who, after a protracted trial, acquitted the accused, holding that they were in possession of the disputed land and were protected by the right of private defence. The Magistrate thereafter drew up a proceeding under s. 476 of the Criminal Procedure Code against Faujdar and Ram Khelawan and directed their prosecution under s. 193 of the Penal Code for giving false evidence in the case.

Faujdar moved the High Court and obtained a Rule from Sharfuddin and Teunon, JJ., to set aside the order of acquittal in the terms set forth in the judgment of the learned Chief Justice.

The case was heard before Jenkins C. J., and Teunon J. and their Lordships having differed in opinion delivered the following judgments:—

JENKINS C.J. A charge was framed under section 148 of the Indian Penal Code against twenty-three persons, and after a lengthy trial they were acquitted. The complainant thereupon applied to this Court for the exercise of its revisional powers under section 439 of the Indian Penal Code with the result that a Rule was issued in these terms: "Let the record be sent for and let a Rule issue calling upon the District Magistrate of Darbhanga and the opposite party to show cause why the order of acquittal complained of should not be set aside and a retrial ordered. Pending the disposal of the Rule further proceedings under section 476 of the Criminal Procedure Code will be stayed". Cause has now been shown. The petition

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on which the Rule was made does not mention proceedings under section 476 of the Criminal Procedure Code.

From the judgment, however, it appears that the trial Magistrate expressed his intention to direct, under section 476 of the Criminal Procedure Code, the prosecution of Ram Khelawan Tewari under section 193 of the Indian Penal Code, and also of two persons described as Faujdar and Bahadur. Though Faujdar alone was the petitioner, the stay apparently was intended to operate in favour of all three. The case lasted, we have been told, about three months before the lower Court. Many witnesses were examined, and an elaborate judgment was pronounced by the trial Magistrate who fully discussed the voluminous evidence in the case with the result that he came to a conclusion in favour of the accused on the two principal issues in the case. He held that the accused's party were in possession of the land in dispute, and that the injuries inflicted on the complainant's party were a justifiable exercise of the right of defence.

I understand that the Rule was granted on the ground that the Court was not satisfied with these conclusions, and that the interests of justice required an interference with the order of acquittal.

It is evident, however, that the conclusions of the lower Court must have rested largely, if not in their entirety, on the trial Magistrate's appreciation of the evidence adduced before him. The only question then is whether in the proper exercise of its discretion the Court ought to interfere for the purpose of setting aside the acquittal and sending back the case for a repetition of the lengthy trial of the case. That we have power to interfere seems clear ; but to the question whether we ought to interfere I would answer in the negative.

Section 417 of the Criminal Procedure Code enables the Local Government to direct the Public Prosecutor to present an appeal to the High Court from an order of acquittal passed by any Court other than a High Court. This provision, which first appeared in the Code of 1872 provides the valuable safeguard that an accused cannot have his acquittal questioned by way of appeal except at the instance of the Local Government But even with this safeguard the provision has met with considerable animadversion in recent times.

In this case, however, the Court, so far from having the assurance of such a safeguard, is confronted by the fact that the application to set aside the acquittal is opposed not only by the accused but also by the Deputy Legal Remembrancer on behalf of the Crown. And I can quite understand this opposition. The complainant and his companions in the theft that led to blows were obviously mere puppets, and the real moving spirit is this same Ram Khelawan Tewari who is described as the petitioner's master and has throughout been present in Court sitting behind the

eminent counsel and vakils who have appeared on behalf of the complainant. I will not discuss his merits or his frailties as disclosed by the Trial Magistrate's judgment, but it is apparent that this is one of a series of unsuccessful attempts to assert possession of the piece of land in dispute against the accused's party.

It has failed; but more than that, it has been held that possession was with the accused's party, and proceedings against Ram Khelawan Tewari have been directed. This is a serious matter for him and he obviously has an urgent personal interest in securing interference with the Magistrate's order. In view of all the circumstances before us, I am convinced that the purpose of the application is not to secure the due administration of justice, but to serve a personal end.

This, therefore, is not a case in which the Court should (in my opinion) interfere, and in expressing this view I believe I am acting in harmony with the tendency of the best judicial opinion, as also sound principle.

The pronouncements of the High Courts of Madras, Bombay and Allahabad, consistently support the view that, as a general rule it is expedient not to interfere, on revision, at the instance of a private person, with an acquittal after trial by the proper tribunal, and that applications for that purpose should be discouraged on public grounds: *Thandavan* v. *Perianna* (1), *Heerabai* v. *Framji Bhikaji* (2), *Queen-Empress* v. *Ala Bakhsh* (3), *In the matter of Sheikh Aminuddin* (4), *Emperor* v. *Madar Bakhsh* (5), *Qayyum Ali* v. *Faiyaz Ali* (6).

This too was the view that prevailed in this Court until recent times [*In re Municipal Committee of Dacca* v. *Hingoo Raj* (7), and *Deputy Legal Remembrancer* v. *Karuna Baistobi* (8)] but it is said that of late the matter has been differently regarded. If there has been any conscious departure in more recent cases from the rule of prudence, which prevailed in the authorities I have cited, I cannot agree with it.

Our attention has been invited to a decision in which I took part as though it supported the new departure: *Rakhal Das Roy* v. *Kailash Banu* (9). I am in no way impressed by the value of that decision. In the first place it appears that the vakil of the accused was not present, and the decision possesses all the infirmity of a judgment given without the assistance of argument for the accused. And apart from that, the circumstances were exceptional.

(1) (1890) I. L. R. 14 Mad. 363.
(2) (1890) I. L. R. 15 Bom. 349.
(3) (1884) I. L. R. 6 All. 484.
(4) (1902) I. L. R. 24 All. 346.
(5) (1902) I. L. R. 25 All. 128.
(6) (1904) I. L. R. 27 All. 359.
(7) (1882) I. L. R. 8 Calc. 895.
(8) (1894) I. L. R. 22 Calc. 164.
(9) (1909) 11 C. L. J. 113.

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JENKINS C.J.

The error was one of pure law apparent on the face of the record, while the offence was one under section 504, and I have always understood that offences of an essentially personal character, such as defamation or insult, were viewed differently for the purpose of revision, and for an obvious reason. According to my understanding, therefore, this decision is of no assistance in the present case: if, however, it contravenes what I regard as the true rule of guidance, then I do not hesitate to regard it as erroneous.

As I have already indicated, I am not prepared to say the Court has no jurisdiction to interfere on revision with an acquittal, but I hold it should ordinarily exercise this jurisdiction sparingly, and only where it is urgently demanded in the interests of public justice. This view does not leave an aggrieved complainant without remedy: it would always be open to him to move the Government to appeal under section 417, and this appears to me the course that should be followed.

The result then in this case is that in my opinion the Rule should be discharged. But as I understand from my learned colleague that he would make the Rule absolute, we are equally divided in opinion and the case with our opinions thereon must, therefore, be laid before another Judge.

TEUNON J. In this case one Kasi Chowdhury and twenty-two others were placed on their trial before the Subdivisional Magistrate of Samastipur on charges of rioting under sections 148 and 147 of the Indian Penal Code.

On behalf of the prosecution it is alleged that on the death of one Rameswar Chowdhury his lands (including the field in dispute known as plot No. 65 in village Hatharua) were inherited by his widow, Paltu, that some 1½ years before the occurrence now in question, she removed to the house of her daughter and son-in-law in a neighbouring village called Chok Salem, and on the 4th April 1913, by a registered deed, sold her inheritance to the real complainant, one Ram Khelawan Tewari. Ram Khelawan it is said took possession, and on the day now in question, 15th March 1914, sent his servant Faujdar Thakur and six or seven labourers, with two bullock carts, to bring home the crop of *rahar* from plot No. 65.

The case for the prosecution then is that while these men were loading the crop into the carts, the accused and others to the numbers of 30 or 35, armed with *lathis* and *garasas* (axes), fell upon the party of labourers, put them to flight, and inflicted upon them a number of injuries.

The medical and other evidence in fact shows that of the 7 or 8 labourers six were wounded, sustaining, in all, 28 injuries of which one is described as severe, five were on the head, and nine on the back.

In so far as the occurrence is concerned the trying Magistrate has accepted the case for the prosecution as substantially true He finds that Faujdar and his companions were unarmed, and that they were attacked by a mob of men armed with lathis and *garasas*, and that this mob included the majority, if not all, of the accused placed on their trial.

He comes to no finding as to the complicity of the individual accused obviously because he next proceeds to acquit them all on the ground that of the accused Kasi and Narsingh (who are cousins of Rameswar) and their sons, Ramyad and Baldeo, (and Bachu) were in possession of the field in question, and that they and their companions were, therefore, acting in the exercise of the right of private defence of property.

This brings us to a consideration of the defence.

The accused have said nothing regarding either the occurrence or possession but have contented themselves with pleading not guilty. Their case, in so far as it can be ascertained from the cross-examination of the prosecution witnesses and the depositions of the few defence witnesses examined, is that Rameswar (the deceased husband of Paltu) and his brother Mahadeo were not separate, as is the case for the prosecution, but joint in mess and property, that Rameswar predeceased Mahadeo, that Mahadeo in his life time adopted Ram Golam, the son of his cousin Kasi, that since Mahadeo's death, some 18 years ago, first Ram Golam, and, on his death, Kasi, on behalf of Ram Golam's minor son Chandrika, has been in possession.

With regard to the adoption of Ram Golam, the trying Magistrate observes that "this line of defence" was dropped, and that the defence then resolved itself into a bare assertion of possession. Possibly this attitude was taken up in the course of argument, but in so far as the record goes, possession based on the adoption of Ram Golam is the only case that the defence made any attempt to establish. There is uncontradicted evidence that Mahadeo and Rameswar lived apart from their cousins (or second cousins) Kasi and Narsingh ; and of possession by Narsingh and his sons, who (P. W. 12) are again separate from Kasi and his son since the death of Mahadeo, there is not a tittle of evidence on the record.

As regards Kasi's possession, the finding is based on (i) the estate register of mutations or changes among its tenants for the years 1319 to 1321, (ii) a chowkidari assessment register, (iii) certain receipts, (iv) an oral complaint made by Ramyad to the Manager of the estate, (P. W. 14), and (v) the oral evidence of three defence witnesses.

The prosecution, it may be observed, relies upon the same receipts and upon what the trying Magistrate cursorily describes as the '*khatian*' that is the entry in respect of plot 65 in a record-of-rights finally published in or about the year 1901-02.

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That entry, it may be noted here, shows that the tenants in possession are Musammat Paltu and Ram Golam, "adopted son."

The mutation registers were produced by the defence witness No. 1, who describes himself as the mutation inspector of the circle. It is significant that the defence did not call for any register prior to 1318, and from this and the evidence of the witness, it may be safely inferred that up to 1318, or rather 1319, the estate registers are in confirmity with the record of rights. The change introduced in 1319 was the substitution of the name of Chandrika, for the name of his deceased father, Ram Golam. This change, it may be said, in no way affected the position of the widow Paltu, and, in any case, as the witness says, was made without any reference to her or to any one interested on her behalf.

The assessment register does not show the name of Paltu, but, as appears from the evidence of the witness who produces it, the register is based on hearsay, and the absence of the widow's name may further be due to its being considered that she was not liable to assessment.

Such receipts as have been produced show that from the year 1292 to 1308 (say 1901-02) the payment was made by Kasi on behalf of Mahadeo, that in 1908 and in 1912-13, the payments were by Kasi or Kasi's son, Ramyad, on behalf of Paltu and Ram Golam. The change in name, it is suggested by the trying Magistrate, is due to some change in the Malik's register, but that change was obviously due to the record-of-rights, and the receipts are in accordance with that record.

On the complaint of Ramyad to the Manager no action was taken; it was subsequent to the purchase of Ram Khelawan, and is obviously of no more value than Ram Khelawan's unsuccessful application to the same Manager for mutation.

From this resume of this portion of the evidence, it is clear that, in coming to his finding regarding possession, the Magistrate has relied on registers that are either worthless or inadmissible, has misapprehended the true significance of the receipts produced, and the acceptance of such receipts by one or more of the agnates who now claim possession on their own account, and has also wholly overlooked the probative value that, under section 103-B of the Bengal Tenancy Act, should have been given to the entry in the record-of-rights.

I need not examine the oral evidence on either side as the Magistrate's view of this evidence (both as regards Paltu's possession and as regards the possession of Ram Khelawan subsequent to his purchase) has been coloured by his erroneous view of the documents already referred to, and also by a prejudice against Ram Khelawan based largely on police reports wholly inadmissible in evidence.

There being no evidence of any adoption, and that case having been

in fact abandoned, it is clear that all the documentary evidence, and even the oral evidence adduced by the defence (*vide* for instance D. W. 3) indicates that, in so far as prior to Ram Khelawan's purchase Kasi and his son Ramyad cultivated these fields, they did so on behalf of the widow, and it is doubtless because of her complaints against them (*vide* e. g. D. W. 4) that she retired to Chok Salem and finally sold her lands to Ram Khelawan.

On my consideration of the evidence I am, therefore, satisfied that there are grave reasons for thinking that the finding as to possession is wrong. In any case on a finding arrived at by a process of reasoning vitiated by so many errors no value can be placed.

Even, however, if we assume that the Magistrate is right in his finding that possession was with Kasi and others, and that the act of the complainant, in removing or seeking to remove the crops constituted the offence of theft, we have next to consider whether the Magistrate has adequately dealt with the further questions regarding the right of private defence.

On these questions all he says is this : " As the thanah is no less than six miles from the place of occurrence, *Ganouri Lal Das* v. *Queen-Empress* (1) must clearly be distinguished. *Pachkauri* v. *Queen-Empress* (2) is followed. In that case it was held that if accused were rightfully in possession of the land and found it necessary to protect themselves from aggression on the part of another body of men, they were justified in taking such precautions as they thought were required, and using such force or violence as was necessary to prevent the aggression. This applies to the circumstances of this case."

This judgment does not show that it was present to the mind of the Magistrate that the burden of proving circumstances bringing the case within the general exception contained in section 96 of the Indian Penal Code was upon the accused. It further does not show that he had any due regard to the restrictions placed upon the exercise of the right of private defence by the 3rd and 4th clauses of section 99. True he says, the thanna is six miles off, but he makes no reference to dafadars and chaukidars, of whom one, it is in evidence, lives not more than two bighas from the field in dispute. He has not adverted to his own finding that Faujdar and his 6 or 7 companions were unarmed, nor, so far as appears, has he taken into consideration the number of persons injured and the number and position of the injuries sustained. He does not appear to have inquired whether for instance the injuries on the back were caused in the exercise of the right of private defence, nor has he made any endeavour to ascertain which of the accused is responsible for specific injuries. Even if some of the accused have succeeded in bringing themselves within the exception it does not follow that all have done so.

(1 (1889) I. L. R. 16 Calc. 206. (2) (1897) I. L. R. 24 Calc. 686

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For these reasons, I am satisfied that there has been no proper trial of this case, and I should, therefore, set aside the order of acquittal in the case of each of the accused and direct that they be retried before another Magistrate in accordance with law.

It has been urged before us that inasmuch as under section 417 of the Code the right to present an appeal against an acquittal is vested in the Local Government, and in the Local Government alone, and inasmuch as the Local Government, so far from appealing, has appeared through its accredited representative in support of the Magistrate's judgment, we ought not, at the instance of a private complainant, to interfere with or disturb the present order of acquittal. But, doubtless for good reasons, the Legislature has not constituted the Local Government the sole arbiter in these matters. An alternative remedy against injustice done to injured complainants has been provided in section 439 of the Code, (I need not here refer to the Charter) and even where, as in this case, the Local Government has taken the unusual course, in my experience the unprecedented course, of appearing to justify what is *primâ facie* riotous behaviour, it is conceded that we have ample jurisdiction to interfere and remedy the wrong, if wrong has been done. It has indeed been faintly suggested on behalf of the accused that by proceeding under section 494 of the Code the Local Government may nullify any order this Court may make. But this suggestion has not come from learned counsel appearing on behalf of the Local Government. It is not to be anticipated that the Local Government will take this course, and we need not, therefore, at the present stage consider whether the Judge's order of consent predicated by section 494 is not again an order subject to the revisional jurisdiction of this Court.

The question thus becomes one not of jurisdiction but of discretion. As to the manner in which discretion should be exercised a large number of decided cases, of which the cases *Heera Bai* v. *Framji Bhikaji* (1), *Thandavan* v. *Perianna* (2), *Queen-Empress* v. *Ala Bakhsh* (3) and *In re Municipal Committee of Dacca* v. *Hingoo Raj* (4) are examples, have been cited before us. But with all deference to the learned and experienced Judges who decided those cases I am not pressed by their decisions, nor do I consider it necessary to determine whether the present case does or does not fall within one or other of the rules or general principles therein enunciated. The enactment has set up no bars or limits to our discretion. That being so this discretion cannot be fettered by judicial decision, and in this connection it is sufficient to cite the observations of His Lordship the

(1) (1890) I. L. R. 15 Bom. 349.
(2) (1890) I. L. R. 14 Mad. 363.
(3) (1884) I. L. R. 6 All. 484.
(4) (1882) I. L. R. 8 Calc. 895.

Chief Justice to be found in the case of "*In re an Attorney* (1)." "The section is expressed in the widest terms and vests in the Court an absolute and unqualified discretion. Not one jot or tittle can be taken away from or added to the plain and express provisions of the Legislature by any decision of the Court; nor can the discretion vested by the section in the Court be crystallized or restricted by any series of cases: it remains free and untrammelled to be fairly exercised according to the exigencies of each case." With these observations I am in entire agreement and, in my opinion, they are equally apposite to the section now under consideration as to the section then in question.

In the interests of public justice it may, in certain cases, in my opinion, be as important to redress injustice done to complainants as in other cases to remedy the wrongs of persons unjustly condemned. In the view I have taken of this case and for the reasons I have given, justice in my opinion demands that there should be a retrial. I should, therefore, as I have already stated, set aside the order of acquittal and direct that the accused be retried by another Magistrate in accordance with law.

In consequence of this difference of opinion the case was referred, under s. 429 of the Criminal Procedure Code, to Fletcher J.

Babu Debendra Narain Bhattacharjee, for the petitioner.

Babu Gour Chandra Pal, for the accused, argued only the question of the right of private defence.

The Deputy Legal Remembrancer (*Mr. S. Ahmed*), for the Crown. The High Court has no authority to exercise appellate powers in cases of acquittal at the instance of a private party. Refers to s. 417 of the Criminal Procedure Code. Section 439 no doubt confers very wide powers but the Court can not, having regard to cl. (*4*), convert a finding of acquittal into one of conviction. This shows that its powers of interference lie only in the cases of a grave error of law or of such palpable and gross defect apparent on the face of the record as to amount to a nullity of trial. The Court in revision has a discretion, and should not interfere on the application of a private

(1) (1913) I. L. R. 41 Calc. 446, 457.

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party, especially one of the character of Ram Khelawan who is the real complainant. Teunon J. disposed of the case as an appeal. Refers to the cases cited in the judgment of Fletcher J. and also the following: *Empress* v. *Gayadin*(1), *Emperor* v. *Madar Bakhsh*(2), *Empress* v. *Miyaji Ahmed*(3), *In the matter of David*(4).

FLETCHER J. This case has been laid before me under the provisions of section 429, read with section 439 of the Code of Criminal Procedure, owing to there being a difference of opinion between the learned Chief Justice and Teunon J. before whom the case came.

Twenty-three persons were charged with having committed an offence punishable under section 148 of the Indian Penal Code. After a trial which lasted about three months the Magistrate acquitted all the accused. An application was then made to this Court to set aside the acquittal and to direct a retrial. That application came on before Sharfuddin and Teunon JJ. who issued a Rule on the opposite party to show cause why the order of acquittal should not be set aside and a retrial ordered. The Rule subsequently came on for hearing before the learned Chief Justice and Teunon J. who differed in opinion, the Chief Justice being of opinion that the Rule ought to be discharged, whilst Teunon J. was of opinion that the Rule should be made absolute.

The application to set aside the order of acquittal is opposed both by the accused and by the Local Government.

The present application raises a point of considerable public importance namely—ought the Court

(1) (1881) I. L. R. 4 All. 148.
(2) (1902) I. L. R. 25 All. 128.
(3) (1879) I. L. R. 3 Bom. 150.
(4) (1880) 6 C. L. R. 245

ordinarily to exercise the powers, which it undoubtedly has under section 439 of the Code of Criminal Procedure, to set aside an order of acquittal at the instance of a private prosecutor? All the High Courts in India have for many years past consistently held that they ought not so to do. It will be sufficient if I give the references to the reported cases in support of this proposition. They are *Queen-Empress* v. *Shekh Saheb Badrudin* (1), *Heerabai* v. *Framji Bhikaji* (2), *Thandavan* v. *Perianna* (3), *Queen-Empress* v. *Ala Bakhsh* (4), *Queen-Empress* v. *Prag Dat* (5), *In the matter of Sheikh Aminuddin* (6), *Qayyum Ali* v. *Faiyaz Ali* (7), *In re Municipal Committee of Dacca* v. *Hingoo Raj* (8), *Deputy Legal Remembrancer* v. *Karuna Baistobi* (9). The learned Chief Justice was of opinion that the settled practice of the Courts founded on sound judicial opinion and public grounds should be adhered to.

Teunon J., on the other hand, was of opinion that, as section 439 of the Code of Criminal Procedure is drawn in the widest terms, no previous decisions could in any manner fetter the way in which the Court should exercise the discretion vested in it under the section. In support of this view, Teunon J. referred to certain remarks of the Chief Justice in the case *In re An Attorney* (10). But with all due respect to the learned Judge those remarks of the learned Chief Justice do not affect the point under consideration. The Deputy Legal Remembrancer informed me that some four or five Rules have of recent times been granted by this Court on applications by private prosecutors

(1) (1883) I. L. R. 8 Bom. 197.
(2) (1890) I. L. R. 15 Bom. 349.
(3) (1890) I. L. R. 14 Mad. 363.
(4) (1884) I. L. R. 6 All. 484.
(5) (1898) I. L. R. 20 All. 459.
(6) (1902) I. L. R. 24 All. 346.
(7) (1900) I. L. R. 27 All. 359.
(8) (1882) I. L. R. 8 Calc. 895.
(9) (1894) I. L. R. 22 Calc. 164.
(10) (1913) I. L. R. 41 Calc. 446.

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to set aside orders of acquittal. He, however, also informed me that all these Rules excepting one were granted by the Bench which granted the Rule in the present case. That cannot, in my opinion, be taken as casting doubt on the well established rule adhered to both in this Court and in the other High Courts in India over a long series of years. That rule is founded on grounds of public interest and convenience and ought, I think, to be adhered to.

In addition to the difference of opinion of the learned Judges in the present case as to there being a settled practice that the Court will not ordinarily interfere in revision at the instance of a private prosecutor with an order of acquittal, the learned Judges also differed as to whether the circumstances in this case were such as would induce the Court in any event to interfere.

The learned Chief Justice was of opinion that there was no reason to think that the Magistrate, whose judgment rests on an appreciation of the evidence that had been given before him, came to a wrong conclusion. Teunon J., on the other hand, thought that there were strong grounds for thinking that the judgment of the Magistrate amounted to a miscarriage of justice. I see no reason to assent to the view of Teunon J.

No one can doubt that the complainant in this case is merely the creature of Ram Khelawan Tewari, and that this prosecution forms one of a series of cases in which Ram Khelawan Tewari has tried to enforce his right to the land in question.

I, therefore, agree with the view set out by the learned Chief Justice in his judgment. The Rule must, therefore, be discharged.

E. H. M. *Rule discharged.*

Errata.

Page 386, line 4, for "*malaholder*" read "male holder."
Page 390, line 18, *for* "mothers" *read* "mother's."
Page 399, lines 21, 22, for "*bandhus*" read "*bandhu.*"

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

AKHOY KUMAR BANERJEE 1914

June 8.

v.

CORPORATION OF CALCUTTA.*

Rates and Taxes, arrears of—Consolidated rate—Charge—Calcutta Municipal Act (Beng. III of 1899) ss. 223, 228—Arrear of consolidated rates whether a first charge on the land and buildings in respect of which it has accrued due—Charge and mortgage, distinction between—Transfer of Property Act (IV of 1882) ss. 55, 58, 100—Bengal Tenancy Act (VIII of 1885) s. 171—Constructive notice—Bona fide purchaser for value without notice.

Section 228 of the Calcutta Municipal Act is not controlled by Section 223 thereof, and makes the consolidated rate, as it accrues due from time to time, a first charge on the premises (subject only to arrears of land-revenue).

A mortgage does, whereas a charge does not, involve a transfer of an interest in specific immoveable property.

Narayana v. *Venkataramana* (1), *Tancred* v. *Delagoa Bay Co.* (2), *Burlinson* v. *Hall* (3) referred to.

Such a charge cannot be enforced against the property in the hands of a *bona fide* purchaser for value without notice.

Kishen Lal v. *Ganga Ram* (4) referred to.

The plea of purchaser for value without notice is a single defence, the onus of proving which is on the defendant.

Attorney-General v. *Bi'phosphated Guano Co.* (5) *Wilkes* v. *Spooner* (6) followed.

* Appeal from Appellate Decree, No. 2322 of 1909, against the decree of Mahim Chandra Sircar, Subordinate Judge, 24-Perganas, dated July 1, 1909, modifying the decree of Anil Chandra Datta, Munsif of Sealdah, dated Feb. 27, 1909.

(1) (1900) I. L. R. 25 Mad. 220, 237.
(2) (1889) 23 Q. B. D. 239, 242.
(3) (1884) 12 Q. B. D. 347, 350.
(4) (1890) I. L. R. 13 All. 28, 44.
(5) (1878) 11 Ch. D. 327, 337.
(6) [1911] 2 K. B. 473, 486.

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Where property with such a charge is foreclosed by the mortgagee, constructive notice cannot be imputed to him to the same extent as to a purchaser at a private sale.

Radha Madhab v. *Kalpataru* (1), *Brahma* v. *Bholi Das* (2) referred to.

Still he should ascertain the true state of affairs before he becomes full owner thereof.

Although a purchaser without notice from a person who had notice, is protected [*Harrison* v. *Forth* (3)] here, purchasers from such a mortgagee cannot claim the protection as, before they acquire title, they might by enquiry from the municipal authorities ascertain the precise period for which the rates were in arrears.

SECOND APPEAL by Akhoy Kumar Banerjee and others, the defendants Nos. 2 to 5.

The facts are shortly these. One Srimatee Soudamini Dasi formerly owned the property in suit being premises No. 49 Tangra Road in Ward No. 19 within the limits of the Calcutta Municipality. On the 13th January 1903, one Hari Charan Ojha, the defendant No. 1 in this suit, purchased the said premises at a public auction in execution of a money decree, subject to a mortgage in favour of one Bankubihari Ghose, who obtained a foreclosure decree in 1914. After becoming full owner of the property on the 19th February 1907, he transferred it to the four persons who are the remaining defendants in this suit. On the 20th August 1908, the Calcutta Municipal Corporation instituted a suit in the Second Court of the Munsif at Sealdah against all the five defendants to enforce a charge on the property in their hands in respect of Rs. 92-7-3 being the arrears of consolidated rates which had accrued due during three years, *viz.*, from the 1st April 1903 to the 31st March 1906. On the 27th February 1909, the learned Munsif dismissed the suit against the defendant No. 1, but declared the

(1) (1912) 17 C. L. J. 209, 214. (2) (1913) 19 C. L. J. 352.
(3) (1695) Finch's Prec. Ch. 51.

plaintiffs' claim for rates to be a first charge upon the said premises and decreed the suit against defendants Nos. 2 to 5 who on appeal to the Subordinate Judge of Alipore merely succeeded in getting the personal liability set aside. Hence this second appeal by the said defendants to the High Court, on two grounds: *viz.*, (*i*) whether an arrear of consolidated rate is a charge on the land and buildings in respect of which it has accrued due; and (*ii*) if there is such a charge, whether it can be enforced against the property in the hands of the present appellants.

Babu Nagendra Nath Ghose, for the appellants. This is a test case by the Calcutta Corporation. The suit is based on s. 100 of the Transfer of Property Act, for a declaration that some quarters' arrears of rates for the premises in suit are a charge on the property, and for enforcement thereof by sale. The defendants are subsequent purchasers and were not the owner or occupier when the rates had fallen due. These defendants had paid arrears of rates for one year next before their purchase, for which he was liable under s. 223. (Refers to ss. 171 and 215 of the Calcutta Municipal Act). Section 215 deals with the distraint of moveable property of defaulter. Section 227 is the only section which enables a suit being instituted and that against the *defaulter* only. A charge confers no interest in land. An arrear of rates may be a *first* charge and thus have priority over other charges of earlier date even, but it is not a mortgage or a first mortgage. See s. 58 of the Transfer of Property Act. Section 227 is to be read along with s. 223 which shows that liability for only one year before purchase can be enforced by suit under s. 227, and s. 228 should be read with s. 227. If a charge under s. 228 attaches to every moveable of a defaulter, irrespective of notice, then

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a purchaser of books, etc., and provisions would be liable for the rates of a defaulting shopkeeper. A charge is not a mortgage and it cannot bind purchasers unless it is proved that they purchased with notice, otherwise the Calcutta Municipality can acquire an interest in almost all the property in Calcutta by allowing it to fall into arrears.

Mr. S. P. Sinha (with him *Babu Debendra Chandra Mullick*), for the respondent. I submit that the decision of the question in issue depends on the interpretation of s. 228 of the Calcutta Municipal Act. There is the liablity of the person, original or inherited, and the liability of the property. The provision of distraint is only an additional remedy in favour of the Municipality. They are not obliged to distrain. They may bring a suit, arrest, attach property elsewhere, etc. In distraint they are only given an expeditious procedure in their favour. But that does not deprive them of the right that any creditor has to recover his dues. Additional and exceptional remedies are provided *re* owners' and occupiers' shares.

[MOOKERJEE J. The other side does not question all this. He says, how do you know I am a defaulter, and then his second point is that s. 228 has to be read along with s. 223.]

But s. 228 is not a corollary to s. 227.

[MOOKERJEE J. Is *defaulter* defined anywhere in the act?]

No. But *defaulter* means any one who is liable, but has failed to pay.

[MOOKERJEE J. It is quite conceivable that more than one person may be a defaulter with respect to the same sum].

The purchaser inherits one year's liability of defaulting owner. Consolidated *rates* are levied

because the property is benefited, while licenses, etc., are personal. The liability of the property is unrestricted (irrespective of the owner), whereas the liability of the person is limited, therefore, s. 228 provides that the property should be the security. Whoever may be the man during whose ownership the arrears fell due, though his person and moveables are liable only for one year's default, still so far as the immoveables are concerned the property is liable without any limitation for one year as is the case for personal liability of moveables. That is the scheme of the Act. Chapter XVIII deals with the special procedure for recovery of rates, etc. A charge is created by contract or by Statute (here, under s. 228) leaving the enforcement of the remedy (under the charge) to the ordinary law. First you have to determine who are personally liable, and then decide whether you will enforce that liability by distraint or by suit

[MOOKERJEE J. But is a charge enforceable against a *bona fide* purchaser without notice?]

This is a matter for the defence and not for the plaintiff to allege. Whoever takes the land does so subject to the charge, unless he proves that he purchased *without notice*. This does not create a title but raises a defence. This man paid one year's arrears, and therefore knew that the rates were unpaid.

[*Babu Nagendra Nath Ghose.* I am an auction-purchaser, or purchaser from him.]

The question of *bona fide* purchaser for value does not arise at all as it was not pleaded. My friend's reading of s. 228 would be this "shall be a first charge (only subject to land revenue) in the hands of the purchaser *for one year*." *Cf.* s. 65 of the Bengal Tenancy Act for first charge of rent.

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Babu Nagendra Nath Ghose, in reply. It is argued that the charge attaches irrevocably to the property because the property is benefited. I am unable to conceive how the services of the Municipality, *e.g.*, gas, water, police, etc., stick to the land. It benefits the then owner, but not his successor; and s. 227 provides the only remedy by suit for the enforcement of charges.

[MOOKERJEE J. If that is so, would it not have come after s. 228?]

It is a right arising under Statute and can therefore be enforced only by the method provided in the same statute. It would be absurd to say that the security to the Municipality would vanish, if the charge be not treated as a mortgage. The onus is on the Municipality to show that I am bound by this charge. A new issue ought to be framed and sent down for trial as to my being a *bona fide* purchaser for value without notice.

Cur. adv. vult.

MOOKERJEE J. This is an appeal by four of the defendants in a suit to enforce payment of money charged upon immoveable property. The land and buildings in suit lie within the jurisdiction of the Municipal Corporation of Calcutta and were originally owned by Saudamini Dasi. On the 11th September 1897, she executed a mortgage of this property by way of conditional sale. On the 13th January 1903, her right, title and interest were sold in execution of a decree for money against her and were purchased by Hari Charan Ojha, the first defendant to this suit. In 1904, the mortgagee, Bankubihari Ghose, sued to enforce his security, obtained the usual foreclosure decree, and ultimately, when the decree was made absolute, became full owner of the property. On the

19th February 1907, Bankubihari Ghose transferred the property to the four persons who are defendants other than the first defendant to this suit. On the 20th August 1908, the Corporation of Calcutta commenced this action against the five defendants to enforce a charge on the property in their hands in respect of arrears of consolidated rates. These arrears had accrued due during the three years from the 1st April 1903 to the 31st March 1906.

The first defendant resisted the claim on the ground that she was not the owner in possession of the property and that no personal decree could be made against her. The remaining four defendants contended that there was no statutory charge enforceable against the property in their hands, and that as the arrears had accrued due more than one year before they became owner of the property, no personal decree could be made against them. The Courts below have dismissed the suit against the first defendant, as also the claim for a personal decree against the other defendants. But they have made a decree which entitles the Corporation to realize the arrears by sale of the land and buildings, if the decretal amount is not paid within thirty days of the decree. In the present appeal, which has been preferred by the defendants, other than the first, two points require consideration, namely, *first*, whether an arrear of consolidated rate is a charge on the land and buildings in respect of which it has accrued due; and, *secondly*, if there is such a charge, whether it can be enforced against the property in the hands of the present appellants.

The answer to the first question, namely, whether an arrear of consolidated rate is a charge on the land and buildings in respect of which it has accrued due, must depend upon the true construction of the

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provisions of the Calcutta Municipal Act, 1899. For this purpose, reference may briefly be made to the relevant sections. The fourth part of the Calcutta Municipal Act deals with the subject of taxation, and comprises Chapters XII to XIX which include sections 147 to 235. Chapter XII treats of rates. Section 147 specifies four different classes of rates, which the Corporation is authorised to impose upon buildings and lands within its jurisdiction. Section 149 lays down that these rates are to be levied as one consolidated rate. Section 171 makes the consolidated rate payable in equal halves by the owner and the occupier. Sections 178 and 186 specify the circumstances under which the entire consolidated rate may be levied from the owner, or from the occupier. We next come to Chapter XVIII, which defines the special procedure for recovery of the consolidated rate. Section 212 lays down that the provisions of the Chapter shall be deemed to be in addition to and not in derogation of any powers conferred in other Chapters for the collection or recovery of the consolidated rate. Section 215 provides for one mode of realization of the rate, namely, by distress. Sub-section 3 of section 222 places a restriction upon the recovery by distress against the occupier of an arrear due from the owner; no arrear of the consolidated rate can be recovered by distress from any occupier or subtenant, if it has remained due for more than one year; or if it is due on account of any period, for which such occupier or subtenant was not in occupation of the premises on which the rate is assessed. Section 223 defines the extent of the liability of the purchaser of any building or land for his vendor's share of arrears of consolidated rate; the purchaser is liable for the amount due on account of the owner's share for any period not exceeding one year prior to his

purchase. Section 227 authorises a suit for recovery of arrears of consolidated rate in substitution for or in addition to the summary remedy by distress and sale. Section 228, which makes the consolidated rate a first charge on the premises, is in these terms. "The consolidated rate, due in respect of any building or land, shall, subject to the prior payment of the land revenue, if any, due to the Government thereupon, be a first charge upon the said building or land and upon the moveable property, if any, found within or upon such building or land and belonging to the person liable for such rate." The language of this section is perfectly plain, and the intention of the Legislature to make the consolidated rate a first charge upon the premises is obvious. But an earnest endeavour has been made, on behalf of the appellants, to restrict its scope and operation by a reference to Section 223. It has been argued that as the purchaser of the premises is liable for arrears of consolidated rate, which have accrued due before title vested in him, only to the extent of arrears for the year immediately prior to his purchase, section 228 should be so interpreted as to restrict the charge on the property in his hands, only to arrears for which he is liable. This contention is clearly fallacious, as the two sections are concerned with two entirely distinct aspects of the matter. Section 223 deals with the question of the personal liability (liability *in personam*) of the purchaser of the premises for arrears unsatisfied when the title vested in him. Section 228 deals with the question of the liability of the premises (liability *in rem*) for the rates due thereon. Section 228 is perfectly general in its terms and makes the consolidated rate, as it accrues due from time time, a first charge on the property (subject to arrears of land revenue). The objects of the two sections are radically distinct and

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section 228 cannot be controlled by Section 223. We may add that no attempt has been made here to support the view unsuccessfully put forward in the Court below, that the expression "belonging to the person liable for such rate" in section 228 qualifies, not only the expression "moveable property" but also the expression "building or land." We hold accordingly that section 228 makes the consolidated rate, as it accrues due from time to time, a first charge on the premises.

The answer to the second question, namely, whether such charge can be enforced against the property in the hands of the appellants, must depend upon the nature and incidents of the charge. A charge is defined in Section 100 of the Transfer of Property Act in the following terms:

"Where immoveable property of one person is, by act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property". The distinction between a mortgage and a charge, thus indicated in section 100, is of a fundamental character, and was explained by this Court in the case of *Royzuddi* v. *Kali Nath* (1) *Sub-nom Royzuddi* v. *Kritarathanath* (2). There is this well marked distinction between the two, that a mortgage does, whereas a charge does not, involve a transfer of an interest in specific immoveable property: *Narayana* v. *Venkataramana* (3), *Tancred* v. *Delagoa Bay Co.* (4), following *Burlinson* v. *Hall* (5) where Day J. observed as follows: "A charge differs altogether from a mortgage: by a charge, the title is not transferred, but the person creating the charge

(1) (1906) I. L. R. 33 Calc. 985.
(2) (1906) 4 C. L. J. 219.
(3) (1900) I. L. R. 25 Mad. 220, 237.
(4) (1889) 23 Q. B. D. 239, 242.
(5) (1884) 12 Q. B. D. 347, 350.

merely says that out of a particular fund, he will discharge a particular debt."

To the same effect is the decision in *Gobinda Chandra* v. *Dwarka Nath* (1): "a mortgage is a transfer of an interest in specific immoveable property; a charge only secures payment of money out of that property." When liability has been imposed upon property by act of parties, a question of some nicety may arise, whether a mere charge has been created or whether the property itself has been hypothecated. The point is of great practical importance, because, whether the one view is taken or the other, has an important bearing upon the question, whether the property can be followed in the hands of a *bona fide* purchaser for value without notice: *Maina* v. *Bachchi* (2). No such question, however, arises, where, as here, only a charge has been created by express words of the statute, and not a mortgage as in cases under Section 13 of the Patni Regulation or Section 171 of the Bengal Tenancy Act. What, then, is the position? The consolidated rate, as it accrued due, became a first charge upon the property, but no interest in such property was transferred by operation of law to the Corporation. The owner continued to be the full owner of the property; the entire interest therein remained vested in him; when he transferred his right, title and interest in the property, the transferee acquired the whole interest therein. The owner was not in the position of a mortgagor, who has in him nothing beyond the equity of redemption and can consequently convey to the transferee no larger interest in the property. From this principle, the conclusion is inevitable that the charge cannot be enforced against the property in the hands of a *bona fide* purchaser for value without notice; in other words, while

(1) (1908) I.L.R. 35 Calc. 837, 843. (2) (1906) 3 All. L. J. R. 551.

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a mortgagee can follow the mortgaged property in the hands of a transferee from the mortgagor, a charge can be enforced against a transferee, only if he has taken with notice of the charge: *Kishan Lal* v. *Ganga Ram* (1), *Royzuddi* v. *Kali Nath* (2). The question, consequently, arises whether the appellants are purchasers for value without notice. Here, it is worthy of note that they did not, in their written statement, plead that they were purchasers for value without notice. If they wished to avail themselves of this defence, they should have pleaded it. It was ruled in *Attorney-General* v. *Biphosphate Guano Company*(3), and *Wilkes* v. *Spooner*(4), that it is not a case of, first a defence that the defendant is a purchaser for value, and then a reply that he had notice, but of a single defence that the defendant is a purchaser for value without notice, the onus of proving which is on the defendant. But even if we assume that the defence, though not expressly taken in their written statement, is available to the defendants, they are in a position of difficulty from which there is no escape. The appellants are private purchasers of the property, and if they had enquired at the time of their purchase, they would have discovered that the rates were in arrears; as a matter of fact, they would be personally liable under Section 223 for the arrears of the year immediately prior to the date of their purchase, and they admit that they have satisfied such arrears, though they do not disclose whether by enquiry they had ascertained the existence of the arrears before they made the purchase. But let us assume that they had notice of the arrears at the time of their purchase; still, as a purchaser with notice may shelter himself under the title of the person from whom he purchased,

(1) (1890) I. L. R. 13 All. 28, 44.
(2) (1906) I. L. R. 33 Calc. 985, 993.
(3) (1878) 11 Ch. D. 327, 337.
(4) [1911] 2 K. B. 473, 486.

if the latter could successfully raise this defence, we must examine the position of the vendor of the appellants: *Sweet* v. *Southcote* (1), *M'Queen* v. *Farquhar* (2), *Barrow's case* (3), *Wilkes* v. *Spooner* (4). Now, as regards the position of Banku Behari Ghose, the mortgagee who acquired title by foreclosure, he was no doubt not in the position of a private purchaser, and if he had enquired of his mortgagor or the subsequent purchaser of the equity of redemption, neither of them would have been bound to give him any information, such as a vendor is under an obligation to furnish under section 55 of the Transfer of Property Act, to an intending purchaser of his property. The mortgagee, therefore, was in reality a person who acquired title under an involuntary alienation by his mortgagor; to a person in this position, constructive notice cannot be imputed to the same extent as to a purchaser at a private sale: *Radha Madhab* v. *Kalpataru* (5), *Magu Brahma* v. *Bholi Das* (6 . But, by enquiry from the Municipal authorities, he could still have ascertained, whether any arrears of consolidated rate were due. When he took the mortgage, he knew full well that if the rate was not duly paid, the arrears would become a first charge upon the property and would gain priority over his debt; and in our opinion, before he became full owner by foreclosure, he should have ascertained the true state of affairs. He is consequently in the same position as if he had made such enquiry; and the purchasers from him are in no higher position, because, although a purchaser without notice from a person who had notice is protected [*Harrison* v. *Forth* (7)] the appellants cannot claim such protection, as

(1) (1786) 2 Brown C. C. 66.
(2) (1805) 11 Ves. 467.
(3) (1879) 14 Ch. D. 432.
(4) [1911] 2 K. B. 473.
(5) (1912) 17 C. L. J. 209, 214.
(6) (1913) 19 C. L. J. 352.
(7) (1695) Finch's Prec. Ch. 51.

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before they acquired title, they might have by enquiry from the Municipal authorities ascertained the precise period for which the rates were in arrears. We hold accordingly that the appellants are not entitled to protection as purchasers for value without notice.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

BEACHCROFT J. I agree.

G. S. *Appeal dismissed.*

APPELLATE CIVIL.

Before N. R. Chatterjea and Beachcroft JJ.

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June 10.

SAHADORA MUDIALI

v.

NABIN CHAND BORAL.*

Homestead Land—Suit for rent—Jurisdiction—Protected under-tenure—Revenue Sale Act (XI of 1859) s. 37, cl. (4)—Garden—Incumbrances annulment of, on sale of taluk for arrears of revenue—Provincial Small Cause Courts Act (IX of 1887) Sch. II, Art 8—Second appeal—Civil Procedure Code (Act V of 1908) s. 102.

Section 102 of the Civil Procedure Code is no bar to second appeals in suits for rent other than house rent although the value thereof does not exceed Rs. 500 : *vide* Art. 8 of Schedule II of the Provincial Small Cause Courts Act.

Soundaram Ayyar v. *Sennia Naickan*(1) distinguished.

*Appeal from appellate decree, No. 1125 of 1912, against the decree of H. P. Duval, Additional District Judge of 24-Parganas, dated Feb. 19, 1912, reversing the decree of Surendra Krishna Ghose, Munsif of Sealdah, dated April 26, 1911.

(1) (1900) I. L. R. 23 Mad. 547.

When land ceased to be garden land about a quarter of a century ago, and tenants have been settled on the land since then, the tenure is not protected and does not fall within the 4th exception to section 37 of the Revenue Sale Act (XI of 1859) and is liable to be annulled.

The effect of a sale is not *ipso facto* to avoid under-tenures; the purchaser has the option of avoiding them or keeping them intact.

Titu Bibi v. *Mohesh Chunder Bagchi* (1) followed.

It is necessary therefore that the purchaser must by some unequivocal act indicate his intention to avoid under-tenures if he desires to do so and the election of the purchaser to avoid must be brought to the knowledge of the under-tenure holder.

A formal written notice is not essential.

Dursan Singh v *Bhawani Koer* (2) followed and explained.

The facts, that the purchaser demanded rents from the tenants to the knowledge of the under-tenure holder, sued the tenants for rent, took out warrants of attachment in execution of decrees, and realized rents from the tenants in repudiation of the under-tenure-holder's title, go to show that the under-tenure-holder had not only notice of unequivocal acts on the part of the purchaser indicating his election to avoid the *mokarrari*, but the purchaser had in fact obtained possession of the estate.

Mir Waziruddin v. *Deoki Nandan* (3) distinguished.

Per N. R. CHATTERJEA J. The mere fact that a garden was made on a piece of land a quarter of a century before the sale would not make it land on which a garden has been made for all time to come.

Per BEACHCROFT J. No particular method of expressing an intention to annul an under-tenure is necessary. There must be established (i) a definite intention to annul, (ii) an indication of that intention to the under-tenure-holder.

To afford protection the work must *still be in existence* or the land be used for the purpose of the work. The perfect tense in "leases of land whereon . . . gardens *have* been made" denotes a present state.

Obiter: If the *busti* land is covered by the lease of the land on which the mill stands, or if the *busti* is an integral part of the mill and exists only for the purposes of the mill it is possible that it might be protected.

SECOND APPEAL by Sahadora Mudiali, the defendant.

This appeal (second appeal No. 1125 of 1912) and

(1) (1883) I. L. R. 9 Calc. 683. (2) (1913) 17 C. W. N. 984, 987.
(3) (1907) 6 C. L. J. 472, 488.

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appeals from Appellate Decrees Nos. 1264 to 1268 of 1912 are similar. The facts are briefly as follows:—

In 1893 Gobinda Lal Seal purchased 10 bighas of partly garden and partly tenanted land in Titaghar for Rs. 3,500 from one Panchanan Banerji who held this land under various permanent leases executed between 1874 and 1880. The Seals held possession by realizing rent from the tenants, the rate of rent being one rupee a cottah a month as the land is very valuable owing to its proximity to several mills.

Among the leases which Panchanan had taken was one for 1 bigah 16 cottahs (old measurement) from one Aptabuddi in Taluk No. 1678. This taluk consisted only of one plot of land which was identified as being plot No. 196 of the *chitta* of 1846. This plot was originally *lakheraj* and was resumed in that year and settled permanently with Aptabuddi's father, Golapdi Mistri, on a land revenue of Re. 1-3-3.

This taluk having fallen into arrears of land revenue was put up to sale by the Collector, and purchased on 29th March 1908 by one Mahendra Nath Mallik who obtained symbolical possession from the Collectorate peon. As there was some trouble in finding the estate the Kanungo, who had to go and demarcate it, identified the estate as an area of 2 bigahs 14 cottahs by the present style of measurement on the extreme west of the Seal's garden and the purchaser (Mahendra) though he was well aware of the nature of the Seal's claim as permanent lessees, began to try to realize rents and warned the tenants not to pay the rents to Babu Nabin Chand Boral one of the plaintiffs, who was the executor of the estate of the late Manik Lal Seal, successor in interest of Gobinda Lal Seal, the original lessee. As the tenants did not pay the Seals, Babu Nabin Chand Boral sued them for rent.

The tenants in all these six analagous suits set up

the claim of the purchaser Mahendra Nath Mallik as their superior landlord, confessing the Seal's title but avoiding it by matter *ex post facto* as the purchaser had repudiated the status of the incumbrancer standing between the *taluki* interest and the tenants.

The Commissioner appointed by the primary Court to survey the lands came to the same finding as the Collector's Kanungo had arrived at, viz., that the lands for which Nabin Chand Boral was claiming rent appertained to the Estate No. 1678.

On the 26th April 1911, the Munsif of Sealdah, dismissed the plaintiff's suit holding that the purchaser Mahendra Nath Mallik had annulled the incumbrance (*i.e.*, the lease of the Seals) and in consequence the plaintiff had no further interest in the lands, and he could not recover rent.

This decision was reversed on appeal to the Additional District Judge of the 24-Parganas, by his judgment dated 19th February 1912, wherein he held that the relation of landlord and tenant still existed between the plaintiff and the defendants.

Hence the defendants preferred these analogous appeals to the High Court.

Babu Dwarkanath Chakravarti (with him *Babu Mahendra Nath Roy*, *Babu Biraj Mohan Majumdar* and *Babu Harendra Kumar Sarbadhikari*), for the appellants. These are six analagous appeals in rent suits.

[*Mr. B. Chakravarti*, for the respondents. I have a preliminary objection as to the competency of these appeals as they arise out of suits for recovery of arrears of rent of homestead lands valued at less than Rs. 500. Section 102 of the new Civil Procedure Code is a bar to these second appeals, because these rent suits are of the nature cognizable by Courts of

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Small Causes: *Soundaram Ayyar* v. *Sennia Naickan* (1).]

Babu Dwarka Nath Chakravarti, for the appellants. [Reads article 8 of the 2nd Schedule of the Provincial Small Cause Courts Acts.] I submit that these appeals are not incompetent, as suits for the recovery of arrears of rent of homestead lands do not come within the jurisdiction of the Provincial Small Cause Courts. Further, no notification has been made and published by the Local Government vesting Small Cause Court Judges in Bengal in general or the trial Judge in these particular cases, with powers to try rent suits on their Small Cause Court side as in Madras. The opinion of the Full Bench of the Madras High Court in *Soundaram* v. *Sennia* (1) that all suits for rent are of the nature cognizable by the Small Cause Court is, therefore, untenable in Bengal.

Although a sale for arrears of revenue does not *ipso facto* render all incumbrances void, they are voidable at the option of the purchaser. A formal written notice is not necessary in law to annul incumbrances, and the incumbrancer becomes a trespasser from the date of institution of a suit against him. But it is not necessary that a suit should be instituted, when the purchaser, as in the present case, succeeds in realizing rents direct from tenants: that is a sufficient indication (to the under-tenure-holder) of the purchaser's intention to annul the incumbrance. Refers to the observations in *Dursan Singh* v. *Bhawani Koer* (2).

[CHATTERJEA J. A demand for rent from tenants, to the under-tenure-holder's knowledge may amount to notice.]

There are decrees which were obtained by the purchaser before the present rent suits were brought,

(1) (1900) I. L. R. 23 Mad. 547. (2) (1913) 17 C. W. N. 984, 987.

viz., on 3rd August 1909. In clause (*4*) of section 37 Act XI of 1859, the words "*have* been made" indicates (in the use of the present perfect tense) that they must be in existence at the time of sale; the right accrues at the time of the sale when the protection is claimed.

It is the existence of that class of improvements that gives the protection. The land in question being *busti* land does not fall under any of the exceptions mentioned in section 37 of the Land Revenue Sale Act: *Sagore Nath Bose* v. *Rakhal Dasi Debi* (1). These huts do not come within the description of dwelling-houses, which must be of a permanent nature to claim this protection: *Makar Ali* v. *Shyama Charan Das* (2). All the cases proceed on the assumption that the existing state of things *is* a garden and not that it has been a garden.

Mr. B. Chakravarti (with him *Babu Atul Krishna Roy*), for the respondents. I am not going to contend that a formal written notice is necessary, but there must be notice to the under-tenure-holder whose tenure is to be avoided, and that by the auction-purchaser showing by an unequivocal act that he wants to avoid the tenure. He is a trespasser if he approaches the land without notice. It is fraudulent to get at the tenants on the land and win them over, without the knowledge of the under-tenure-holder. He must institute a suit or convey his intention to the incumbrancer or under-tenure-holder of annulling the incumbrance: *Mir Waziruddin* v. *Lala Deoki Nandan* (3). Instead of fighting six cases (as at present) what is there to prevent the auction-purchaser from filing one suit against the incumbrancer alone. My further submission is, that this being a second appeal we must

(1) (1910) 7 Ind. Cas. 912. (2) (1898) 3 C. W. N. 212.
(3) (1907) 6 C. L. J. 472, 488.

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accept the finding of fact arrived at by the lower Appellate Court.

These six suits have been brought by me for rent, and it is for the tenants to show that the relation of landlord and tenant between them and me had been put an end to. What is the date from which they say the under-tenure was annulled? See *Ramtaran Kapali* v. *Aswini Kumar Dutt* (1). This decision will not bind the auction-purchaser. He should file a title suit. The notice is not sufficient. The sale does not *ipso facto* make void all incumbrances but they become voidable only at the option of the purchaser, which must be clear and unequivocal: *Titu Bibi* v. *Mohesh Chunder Bagchi* (2). The effect of the auction-purchaser's action may be a strong desire only. We do not as yet know the actual quantity of land covered by these suits. The defence of *jus tertii* must be proved with regard to the whole tenure: *Bhago Bibee* v. *Ram Kant Roy* (3). Leases of lands which may not have been expressly leased for the purpose of making gardens thereon, but on which gardens have subsequently been made, are excepted under clause (4) of section 37 of Act XI of 1859, and it does not matter if there are some huts on some portion of the garden: *Gobind Chandra Sen* v. *Joy Chandra Das* (4).

[BEACHCROFT J. Do you say that, if it has been a garden at any time, it is protected for ever?]

I say that this provision is for the protection of the Government revenue.

[CHATTERJEA J. Do not the words "have been" mean "are in existence up to the time of the sale?"]

No.

(1) (1910) L. R. 37 Calc. 559, 566.
(2) (1883) I. L. R. 9 Calc. 683.
(3) (1877) I. L. R. 3 Calc. 293.
(4) (1885) I. L. R. 12 Calc. 327.

Babu Dwarkanath Chakravarti, in reply.

Cur. adv. vult.

N. R. CHATTERJEA J. These appeals arise out of suits for recovery of rent of homestead lands comprised in a *maurusi mokarrari* tenure which belonged to the plaintiffs. The defence was that the tenure held by the plaintiffs had been extinguished by the sale of the estate, within which it is situated, for arrears of revenue under the provisions of Act XI of 1859, that the purchaser had entered into possession of the estate and that the defendants had paid the rents to the purchaser.

A preliminary objection has been taken to the hearing of the appeals on behalf of the respondents under section 102 of the Civil Procedure Code. It has been contended that a suit for rent is of a nature cognizable by the Small Cause Court, and reliance is placed on the case of *Soundaram Ayyar* v. *Sennia Naickan* (1). Now, Article 8 of the second Schedule of the Provincial Small Cause Courts Act expressly exempts suits for rent other than house rent from the cognizance of Small Cause Courts unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto. But the majority of the Judges constituting the above Full Bench of the Madras High Court, were of opinion that a suit for rent is of the nature of a suit cognizable by the Small Cause Court. It appears that by a notification the Madras Government has invested all Subordinate Judges and District Munsifs, within the Presidency, with jurisdiction to try on their Small Cause

(1) (1900) I. L. R. 23 Mad. 547.

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Court side all suits for rent falling within the pecuniary limits of their special jurisdiction. No such notification has been issued by the Local Government in this Presidency and so far as this Court is concerned second appeals in suits for rent (other than house rent), although the value thereof does not exceed Rs. 500 have always been entertained. I accordingly overrule the preliminary objection.

Two questions have been raised in these appeals. The *first* is whether the tenure of the plaintiffs is protected under the provisions of clause (*4*) of section 37, Act XI of 1859; and, *secondly*, whether the tenure has been annulled.

As regards the first question it appears that the estate consists only of 2 bighas, 14 cottas of *busti* land. The learned District Judge, however, has held the land is one on which a garden has been made because it formed part of 10 bighas of land which was once a garden and is called Seal's garden. I am of opinion that he is wrong in this view. The land ceased to be garden about a quarter of a century ago, and tenants have been settled on the lands since then. The mere fact that a garden was made on a piece of land a quarter of a century before the sale would not make it land "on which a garden has been made" for all time to come. The land comprised in estate No. 1678 for a very long time has been, and at the time of the sale was *busti* land. In the plaints themselves, the lands are described as homestead lands. I am accordingly of opinion that the tenure does not fall within the exception to section 37 of Act XI of 1859 and is liable to be annulled.

The next question is, whether the tenure has been annulled. It is no doubt true that a sale for arrears of revenue does not *ipso facto* avoid incumbrances or under-tenures, but only renders them voidable at the

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option of the purchaser. See *Titu Bibi* v. *Mohesh Chunder Bagchi* (1). But the purchaser may annul an under-tenure not only by the institution of a suit against the under-tenure-holder, but can do so by any suitable means. It has been contended on behalf of the appellant that it is not necessary to give any notice to the under-tenure-holder for avoiding the tenure, and reliance is placed on an observation in the judgment in the case of *Dursan Singh* v. *Bhawani Koer* (2), *viz.* that "the purchaser may elect to annul an under-tenure not only by institution of a suit, or by giving a notice to vacate, but may indicate it by other means." In that case a notice was in fact given to the under-tenure-holder, and all that was meant to be said was that a formal written notice was not essential. The effect of a sale is not *ipso facto* to avoid under-tenures; the purchaser has the option of avoiding them or keeping them intact. It is necessary therefore that the purchaser must by some unequivocal act indicate his intention to avoid under-tenures if he desires to do so. A formal written notice to the tenure-holder would certainly be the most convenient mode of doing it and this litigation demonstrates the difficulties in which the purchaser may be placed, if he omits to serve a written notice on the tenure-holder. But I do not think that a formal notice is essential and although the election of the purchaser to avoid must be brought to the knowledge of the tenure-holder, a written notice is not the only mode in which it can be done.

The learned District Judge has held that the verbal notice said to have been given to the plaintiff was not proved, and that "the purchaser did nothing to avoid the incumbrance, but only started collecting rent on his own account which I hold cannot be sufficient

(1) (1883) I. L. R. 9 Calc. 683. (2) (1913) 17 C. W. N. 984, 987.

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notice to the plaintiff." But the Court of first instance found that on the purchaser's demanding rent from the tenants, they informed the plaintiff of it, but that he declined to assist them, unless they paid off the arrears of rent due from them, that the purchaser sued the tenants for rent, took out warrant of attachment in execution of decrees and realised rents from the tenants in repudiation of the plaintiff's title, and that Court came to the conclusion that the purchaser is in actual possession of the taluk through the tenants. These findings have not been displaced on appeal. If these findings are correct, they show that the plaintiff had not only notice of unequivocal acts on the part of the purchaser indicating his election to avoid the *mokararri* but that the purchaser had in fact obtained possession of the estate.

It was pointed out on behalf of the respondents that in the case of *Mir Waziruddin* v. *Lala Deoki Nandan*(1) the forcible taking away of crops of the tenants by the purchaser and the institution of rent suits which must be taken to be strong indications of the purchaser's intention to avoid under-tenures were held not to be sufficient. But in that case the purchaser sought to annul under-tenures and recover possession more than 12 years after the date of the sale, and those facts were considered by the learned Judges as bearing upon the question of limitation. The rent suits instituted against some of the tenants were withdrawn, as soon as the latter denied the plaintiff's title, and no further attempt was made to enforce the right to realise any rent from any of the tenants of the property. The only attempt at possession consisted in an endeavour by a servant to take away crops grown by one of the many tenants of the estate and the learned Judges held that an entry upon the

(1) (1907) 6 C. L. J. 472, 488.

land for this purpose, an entry which resulted in a conviction for theft and criminal trespass did not constitute possession much less possession of the entire estate for the purposes of limitation.

In the present case there is no question of limitation. Had the purchaser instituted a suit for annulment of the plaintiff's *mokarrari*, they could have no possible defence to the action, and if the purchaser has succeeded in obtaining possession of the estate peacefully and openly and is in possession of the estate by receipt of rent through the tenants the *mokarrari* of the plaintiff must be held to have been annulled. The lower Appellate Court has, however, not come to a clear finding upon the facts found by the Court of first instance. The decrees of the lower Appellate Court are accordingly set aside and the cases sent back to that Court. That Court will come to clear findings upon the facts found by the Munsif indicated above, and dispose of the appeals according to law. Costs to abide the result.

BEACHCROFT J. All civil suits, the value of which does not exceed Rs. 500, are cognizable by Courts of Small Causes, subject to the exceptions contained in the second schedule of the Provincial Small Cause Courts' Act, and to the provisions of any special Act. Suits for rent, other than house rent, are included in the second schedule of the Provincial Small Cause Courts' Act. But the Local Government has authority to vest Judges of Small Cause Courts with powers to try rent suits. No notification has been made vesting Small Cause Court Judges in Bengal in general, or the Judge of first instance in this particular case, with such powers. I am, therefore, of opinion that this appeal is not incompetent.

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As regards the question of annulment of an under-tenure, I agree with my learned brother in thinking that no particular method of expressing an intention to annul an under-tenure is necessary, but that any unequivocal act is sufficient which indicates the intention to annul and which brings that intention to the knowledge of the under-tenure-holder. The learned Judge has found against the story that definite notice was given by the purchaser to the under-tenure-holder. There remains the question of the collection of rent from the tenants. In my opinion it is impossible to lay down any hard and fast rule as to how far collection from tenants may be taken not only to indicate the intention to annul but also to establish the fact that that intention was brought to the knowledge of the under-tenure-holder. Collection from so large a majority of the tenants as to amount to obtaining possession of the estate would probably be sufficient to indicate the intention to annul to the under-tenure-holder. But other considerations might come in, *e.g.*, whether the number of tenants was large or small, and whether collections were made openly or secretly. It is needless to multiply examples. It is sufficient to say that two things must be established (i) a definite intention to annul, (ii) an indication of that intention to the under-tenure-holder.

As the learned Judge has dealt with this part of the case apparently with the idea that a definite notice was necessary I agree in the proposed order of remand.

As regards the remaining question whether the under-tenure was protected under clause (*4*) of section 37 of Act XI of 1859, it is clear that in so far as protection is claimed on the ground that the land is garden land, the claim must fail. It is apparently now a mill *busti* but the learned Judge held it was

protected because it was part of a larger area on which a garden was once made. Now, the 4th clause of section 37 clearly contemplates improvements or works of a permanent character. These are protected irrespective of whether the lease was or was not given for the purpose of the work in question. But to afford protection the work must still be in existence or the land be used for the purpose of the work. The wording of the clause is "leases of land whereon . . . gardens have been made." The perfect tense denotes a present state. If the garden has ceased to exist, the fact that there was once a garden on the land will not protect it.

Whether the land would be protected as part of a mill *busti* would depend on a variety of circumstances. Land on which there are merely temporary huts is not of course on that account protected, but if the *busti* land is covered by the lease of land on which the mill stands, or if the *busti* is an integral part of the mill and exists only for the purposes of the mill, it is possible that it might be protected. It is not, however, necessary to pursue this point further as protection has not been sought on this ground.

G. S. *Appeal allowed: case remanded.*

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

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June 15.

KHAGARAM DAS

v.

RAMSANKAR DAS PRAMANIK.*

Interest—Stipulation in mortgage bond for interest at 75 per cent. per annum, whether penalty—Liquidated damages—Undue Influence—Embarrassment of debtor—Unconscionable bargain—Contract Act (IX of 1872), ss. 16, 74, illus. (f), as amended by Act VI of 1899, s. 4 (1)—Act XXVIII of 1855, s. 2.

Per MOOKERJEE J. (BEACHCROFT J. agreeing to as to penalty). Notwithstanding the small group of cases where a restricted view was taken of the authority of the Court to relieve against a penalty, the tide has turned back, and the more modern cases repudiate the doctrine that any rate of interest, however exorbitant, cannot be deemed penal.

Motoji v. *Sheikh Hosain* (1), *Pava* v. *Govind* (2) followed.

Arjan Bibi v. *Asgar Ali* (3), *Gokul Chand* v. *Khaja Ali* (4), *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar* (5), *Chinna* v. *Pedda* (6), *Periaswami* v. *Subramanian* (7) not followed.

This principle is fairly deducible from the modern decisions that the Court is competent to grant relief whenever the rate of interest appears to the Court to be penal.

Miajan Patari v. *Abdul Jubbar* (8), *Velchand* v. *Flagg* (9), *Ganapathi* v. *Sundara* (10), *Muthukrishna* v. *Sankaralingam* (11) followed.

*Appeal from Original Decree No. 396 of 1910, against decree of Ali Ahmad, Subordinate Judge of Rungpur, dated May 12, 1910.

(1) (1869) 6 Bom H. C. 8.
(2) (1873) 10 Bom. H. C. 382.
(3) (1886) I. L. R., 13 Calc. 200.
(4) (1890) Punj. Rec. 32.
(5) (1901) I. L. R. 25 Mad. 343.
(6) (1902) I. L. R. 26 Mad. 445
(7) (1902) 14 Mad. L. J. 146.
(8) (1906) 10 C. W. N. 1020.
(9) (1911) I. L. R. 36 Bom. 164 : 14 Bom. L. R. 18.
(10) (1909) 22 Mad. L. J. 354.
(11) (1912) I. L. R. 36 Mad. 229.

Although s. 74 of the Contract Act was originally framed to deal with the doctrine of penalty and liquidated damages as understood in the law of England, it is in its present form comprehensive enough to include the type of cases before the Court, because it covers all cases where the contract contains "any stipulation by way of penalty."

It is obvious that each case must be treated on its own circumstances.

The test is, was the agreement to pay damages for the breach of contract unconscionable and extravagant, such as no Court ought to allow to be entered into.

Webster v. *Bosanquet* (1) referred to.

"You are to consider whether it is extravagant, exorbitant, or unconscionable *at the time when* the stipulation is made—that is to say, in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract."

Clydebank Engineering Co. v. *Don Jose Castaneda* (2) referred to.

A stipulation for merely accelerating payment of the whole debt in default of payment of one or more instalments is not, by itself, by way of penalty.

Ex parte Burden (3), *Sterne* v. *Beck* (4), *Wallingford* v. *Mutual Society* (5) referred to.

But when the entire sum which the creditor had agreed to receive in instalments without interest, is not only repayable in one sum, but is also made to carry interest at an unusual rate, the Court may, in view of all the circumstances of the case, regard the stipulation for payment of interest at an exorbitant rate as penalty.

When (on an account originally made up very largely of interest at an exorbitant rate) the stipulation was made in the mortgage bond (no interest being payable up to due date) that upon default of payment of one or two instalments not only would the whole balance due become forthwith payable, but would carry interest at the rate of 75 per cent. per annum :

Held, that the covenant for payment of interest at this rate was a *penalty*, *i.e.*, it did not represent the damages which the creditors were likely to suffer by reason of the default of the debtors, but was rather intended as an effective means to secure punctual performance of the contract.

Per MOOKERJEE J. Where the facts make it clear that the creditors were in a position to take advantage of the embarrassment of their debtors and the bargain they made was unconscionable, there is a concurrence of

(1) [1912] A. C. 394.
(2) [1905] A. C. 6.
(3) (1881) 16 Ch. D. 675.
(4) (1863) 1 DeG. J. & S. 595.
(5) (1880) 5 App. Cas. 685.

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the two elements which must combine to attract the operation of s. 16 of the Contract Act.

Davis v. *Maung Shwe Goh* (1), *Kesavulu Naidu* v. *Arithulai Ammal* (2) followed.

APPEAL by Khagaram Das and Totaram Das, the plaintiffs.

In this suit the plaintiffs sought to recover Rs. 1,300 as principal and Rs. 3,949-14 as interest thereon at 75 per cent., per annum, from 15th June 1905 to date of suit making a total of Rs. 5,249-14 as. due upon a registered *kistibandi* mortgage bond dated 9th June 1904—no interest being payable up to due date. The bond was for Rs. 1,600 which was made up of two sums, viz., Rs. 1,060-1 as. due upon a previous decree and Rs. 369-15 as. due upon a promissory note for Rs. 300 dated 8th June 1903 carrying interest at one pice per rupee per day, *i.e.*, at the rate of Rs. 750 per cent. per annum. The defendants, Ram Sankar Das and others, had originally borrowed the small sum of Rs. 375 on the 24th July 1895 with interest at 24 per cent. per annum. On the 25th January 1899, the defendants gave the plaintiffs a bond for Rs. 600 in renewal of the promissory note of the 24th July 1895. The bond carried interest at the rate of 75 per cent. per annum. In 1901 the plaintiffs sued to recover this money, but the Court made a decree for the amount named in the bond with interest at 24 per cent. per annum. The amount decreed was Rs. 1,060 carrying interest at 6 per cent. per annum till realisation. On failure to pay up this decree, the debtors (then in a position of extreme embarrassment), on accounts taken between the parties, executed the aforesaid instalment bond for Rs. 1,600 on the 9th June 1904. The creditors agreed to take Rs. 100 in cash and Rs. 1,500 in ten

(1) (1911) I. L. R. 38 Calc. 805; L. R. 38 I. A. 155. (2) (1912) I. L. R. 36 Mad. 533.

instalments to be spread over 5 years: no interest was payable up to the due date, but in default the rate was fixed at 75 per cent. per annum. On the 5th July 1909, the plaintiffs filed this suit for the recovery of Rs. 5,249-14 as. The defence was that the claim for interest at 75 per cent. was not enforceable as it was by way of penalty. Under the circumstances the Subordinate Judge of Rungpur decreed the plaintiff's suit on 12th May 1910, but allowed only 24 per cent. compensation from 15th June 1905 till realisation together with full costs, holding the exorbitant rate to be a penalty. The plaintiffs thereupon preferred this appeal to the High Court claiming interest at Rs. 75 per cent. There was, however, no cross-appeal by the defendants against that part of the Subordinate Judge's decree which was clearly erroneous.

Babu Jogesh Chandra Roy (with him *Babu Abinash Chandra Guha*, and *Babu Hem Chandra Sen*), for the appellants. I submit that interest should have been decreed at the bond rate at 75 per cent. per annum as that was fixed not by way of penalty but as representing liquidated damages: *Sundar Koer* v. *Shyam Krishen* (1), *Arjan Bibi* v. *Asgar Ali* (2), *Sankaranarayana Vadhya* v. *Sankaranarayana Ayyar* (3). The creditor is entitled to enforce the contract strictly under section 2 of Act XXVIII of 1855 which abolished all usury laws in India.

Babu Brojendra Nath Chatterjee, for the respondent. This case falls within the class where there is a stipulation for payment of interest at a specified rate, if the principal or a part thereof was not paid on the due date. I therefore submit, *first*, that the stipulation for payment of interest on default at 75 per cent. was

(1) (1905) I. L. R. 34 Calc. 150. (2) (1886) I. L. R. 13 Calc. 200.
(3) (1901) I. L. R. 25 Mad. 343.

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thus clearly by way of penalty [*Velchand* v. *Flagg*(1)]; and, *secondly*, as the circumstances of the case showed the creditors were in a position to dominate the will of the debtors, the stipulation for payment of interest at an exorbitant rate was not enforceable: see illustration (*c*) of section 16 of the Contract Act; *Miajan* v. *Abdul* (2), and *Muneshar* v. *Sodhi Lal* (3).

Babu Jogesh Chandra Roy, in reply.

Cur. adv. vult.

MOOKERJEE J. This is an appeal by the plaintiffs to enforce a mortgage security executed in their favour on the 9th June 1904. The history of the transactions between the parties prior to the mortgage may be briefly narrated. On the 24th July 1895, the plaintiffs advanced to the defendants a sum of Rs. 375 to carry interest at 24 per cent. per annum. On the 25th January, 1899, the defendants gave the plaintiffs a bond for Rs. 600 in renewal of the promissory note of the 24th July 1895. The bond carried interest at the rate of 75 per cent. per annum. In 1901, the plaintiffs sued to recover their money. The Court held that the plaintiffs should not be allowed interest at 75 per cent. per annum, and made a decree for the amount named in the bond with interest at 24 per cent. per annum. The amount decreed was Rs. 1,060 and this carried interest at 6 per cent. per annum till realization. On the 8th June 1903, the plaintiffs advanced to the defendants a sum of Rs. 300 on a promissory note, which carried interest at one pice per rupee per day, that is, at the rate of 570 per cent. per annum. On the 9th June 1904 accounts were taken between the parties, and it was found that Rs. 1,230 was due on the decree and Rs. 2,010 on the promissory note. The

(1) (1911) I. L. R. 36 Bom. 164; 14 Bom. L. R. 18.
(2) (1906) 10 C. W. N. 1020.
(3) (1909) 13 C. W. N. 1069.

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creditors, however, agreed to receive Rs. 100 in cash and an instalment mortgage bond for Rs. 1,500. The mortgage instrument provided for the payment of this sum of Rs. 1,500 in ten instalments spread over five years, with the condition that if default was made in the payment of one or two instalments, the creditors would be at liberty to realize the whole sum due, together with interest thereon at 75 per cent. per annum from the date of default.

Ample security was given for the sum named, and the plaintiffs accepted the instalment bond. They then commenced this action on the 5th July 1909 on the allegation that only Rs. 200 had been paid by the debtors, that default had been made in the payment of one instalment, and that they had become entitled to realize the entire sum secured less the amount paid, with interest thereon at 75 per cent. per annum from the date of default.

The claim was for Rs. 1,300 as principal money and Rs. 3,949-14 as interest thereon from 15th June 1905 to the date of the institution of the suit. The substantial defence was that the claim for interest was not enforceable. The Subordinate Judge has accepted this view, and has made a decree for Rs. 1,300 with interest thereon at 24 per cent. per annum from 15th June 1905 till the date of realization. The plaintiffs have appealed to this Court and have contended that interest should have been decreed at 75 per cent. per annum. On behalf of the appellants reference has been made to the cases of *Sundar Kumar Koer* v. *Sham Krishen* (1), *Miajan* v. *Abdul* (2), *Kirti Chunder* v. *Atkinson* (3), *Umesh Chandra* v. *Golap Lal* (4), *Mackintosh* v. *Crow* (5), *Prayag* v. *Shyam Lal* (6),

(1) (1905) I. L. R. 34 Calc. 150.
(2) (1906) 10 C. W. N. 1020.
(3) (1906) 10 C. W. N. 640.
(4) (1903) I. L. R. 31 Calc. 233.
(5) (1883) I. L. R. 9 Calc. 689.
(6) (1903) I. L. R. 31 Calc. 138.

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The first contention of the respondents is that the stipulation for the payment of interest at an exorbitant rate upon the entire amount secured by the mortgage in the event of default of payment of one or two instalments was in the nature of a penalty. Before we examine this argument in the light of judicial decisions, it is desirable to point out that in the solution of this question, no real assistance can be derived from the class of cases in which there is a stipulation for payment of interest at an advanced rate on default of payment of principal or interest

(1) (1886) I. L. R. 13 Calc. 200.
(2) (1901) I. L. R. 25 Mad. 343.
(3) (1907) I. L. R. 31 Bom. 348.
(4) (1891) I. L. R. 16 Bom. 618.
(5) (1893) I. L. R. 17 Mad. 382.
(6) (1907) I. L. R. 32 Bom. 37.
(7) (1910) 7 All. L. J. 729.
(8) (1909) 13 C. W. N. 1069.
(9) (1910) 7 All. L. J 591.
(10) (1906) 10 C. W. N. 849; L. R. 33 I. A. 118.
(11) (1911) I. L. R. 36 Bom. 164; 14 Bom. L. R. 18.
(12) [1906] A. C. 368.

on the due date or the other class of cases in which, on default of payment of principal or interest, stipulation is made for payment of compound interest at the same rate as the simple interest originally agreed to be paid or at a higher rate. The case before us falls within the class where there is a stipulation for payment of interest at a specified rate, if the principal or a part thereof is not paid on the due date. One of the earliest examples of this class of cases is the decision in *Motoji* v. *Shekh Hosain* (1), where a promissory note, after stipulating for the repayment of the sum due by monthly instalments without interest, provided that on default of payment of any one instalment, interest would be payable at the rate of 75 per cent. per annum. It was ruled that the stipulation for interest was in the nature of a penalty. This view was followed in *Pava* v. *Govind* (2), where a promissory note provided for repayment of the sum due without interest within three months from the date thereof, and for interest at 75 per cent. per annum in the event of default in punctual payment; it was ruled that the rate of interest was a penalty. The Court overruled the contention that the creditor was entitled to enforce the contract strictly under Act XXVIII of 1855 which abolished all usury laws. Section 2 of the Act provides that in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate if any agreed upon by the parties, and if no rate shall have been agreed upon, at such a rate as the Court shall deem reasonable. The Court held that the statute did not destroy the equitable jurisdiction of the Courts to relieve against a penalty. A similar view was taken in *Bansidhar* v. *Bu Ali Khan* (3). There the defendant agreed to

(1) (1869) 6 Bom. H. C. 8. (2) (1873) 10 Bom. H. C. 382.
(3) (1880) I. L. R. 3 All. 260.

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repay to the plaintiff a loan of Rs. 50 on a certain date and, in default, to pay interest at Re. 1 per day, that is at the rate of 730 per cent. per annum. It was held that, looking at the entire instrument, the amount of interest appeared to be in the nature of a penalty, because "one rupee per diem for failure to pay Rs. 50 is as interest an extortionate amount, for which no adequate consideration is shown and which no man would contract absolutely to pay." The contention that the court was fettered by Act XXVIII of 1855 was overruled, and it was said that if any other view were taken, there would be no limit to the extravagant and extortionate extent to which the most usurious claims might not be carried in the name of "interest." This decision accords with that in *Chuhar Mal* v. *Mir* (1), where interest payable on default at the rate of 37½ per cent. was held penal. In *Kunjbehari Lal* v. *Ilahi Buksh* (2) and *Maya Ram* v. *Nawbat* (3) where the interest stipulated to be paid on default of payment without interest on a specified date, was 24 per cent., it was held to be not penal; the rate, it was said, was not so exorbitant as to justify reduction by the Court. The principle recognised in these cases lies at the root of the decision in *Vythilinga* v. *Ravana* (4), where the defendant had agreed to repay a loan of Rs. 10 within fifteen days, and on default, to pay interest at the rate of one anna per rupee per diem, that is, at the rate of 2,250 per cent. per annum. It was ruled that the stipulation for interest was penal, though the Court was not agreed upon the question, whether section 74 of the Indian Contract Act covered the case. The uniformity of the current of decisions we have analysed, was arrested by the case of *Arjan Bibi* v.

(1) (1880) I. L. R. 2 All. 715.
(2) (1883) I. L. R. 6 All. 64.
(3) (1885) All. W. N. 85.
(4) (1882) I. L. R. 6 Mad. 167.

Asgar Ali (1), where the bond provided for the repayment of the loan within a certain period, and on default, for interest at 150 per cent. per annum from the date of the bond. The Court held that the stipulation for payment of interest was enforceable, as the case fell within section 2 of Act XXVIII of 1855 and was not covered by section 74 of the Indian Contract Act (as it then stood), inasmuch as the bond mentioned only one rate of interest and did not provide for the payment of two rates of interest. This view was adopted in *Gokul Chand* v. *Khaja Ali* (2), though the opposite position was immediately afterwards accepted in *Kanailal* v. *Narayan Das* (3). In *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar* (4) the bond provided for repayment of the sum due in twelve instalments, with the stipulation that in the event of default, the debtor should become liable to pay the whole amount of the loan with interest at the rate of 180 per cent. per annum. The Court held that the rate cannot be said to be exorbitant, "having regard to the relations between the parties and the circumstances in which the defendant undertook the obligation which he failed to fulfil." To the same effect is the decision in *Chinna* v. *Pedda* (5), (where, however, the rate of interest was only 12 per cent. per annum) as also in *Periaswami* v. *Subramanian* (6). Notwithstanding the small group of cases to which we have referred, where a restricted view was taken of the authority of the Court to relieve against a penalty, the tide has turned back, and the more modern cases repudiate the doctrine that any rate of interest, however exorbitant, cannot be deemed penal. Thus, in

(1) (1886) I. L. R. 13 Calc. 200.
(2) (1890) Punj. Rec. 32.
(3) (1894) Punj. Rec. 99.
(4) (1901) I. L. R. 25 Mad. 343.
(5) (1902) I. L. R. 26 Mad. 445.
(6) (1902) 14 Mad. L. J. 146.

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Miajan Patari v. *Abdul Jubbar* (1), where there was a stipulation for the payment of interest at the rate of 75 per cent. per annum from the date of the bond on failure to pay the principal sum in two instalments on specified dates, the Court held that the stipulation was in the nature of a penalty and declined to follow *Arjan Bibi* v. *Asgar Ali* (2) and *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar* (3), as authorities for any inflexible rule of law. This view was adopted in *Velchand* v. *Flagg* (4), where 60 per cent. interest on an account originally made up very largely of interest at an exorbitant rate was treated as penalty. It is obvious that each case must be treated on its own circumstances; thus while in *Aunamalai* v. *Sellappa* (5), interest at 36 per cent. was held not penal, in *Ganapathi* v. *Sundara* (6), compound interest at 300 per cent. on default of payment on due date was deemed a penalty: see *Salem Town Bank* v. *Venkata Chariar* (7), *Sampat* v. *Chango* (8). We adopt the principle, consequently, as fairly deducible from the modern decisions, that the Court is competent to grant relief whenever the rate of interest appears to the Court to be penal. This view has been adopted by a Full Bench of the Madras High Court in *Muthukrishna* v. *Sankaralingam* (9). It is not of much moment to consider whether the Court can grant such relief in the exercise of its equitable jurisdiction or under section 74 of the Indian Contract Act as amended in 1899. It is sufficient to observe that although the section was originally framed to deal with the doctrine of

(1) (1906) 10 C. W. N. 1020.
(2) (1886) I. L. R. 13 Calc. 200.
(3) (1901) I. L. R. 25 Mad. 343.
(4) (1911) I. L. R. 36 Bom. 164; 14 Bom. L. R. 18.
(5) (1911) 10 Mad. L. T. 77; 2 Mad. W. N. 367.
(6) (1909) 22 Mad. L. J. 354.
(7) (1910) 2 Mad. W. N. 134; 9 Mad. L. J. 363.
(8) (1910) 7 Nag. L. R. 46.
(9) (1912) I. L. R. 36 Mad. 229.

penalty and liquidated damages as understood in the law of England, it is in its present form comprehensive enough to include the type of cases now before us, because it covers all cases where the contract contains "*any stipulation by way of penalty.*" The question consequently reduces in any concrete case to this; does the contract contain a stipulation by way of penalty. In the solution of this question, the observations of Lord Mersey in *Webster* v. *Bosanquet* (1) may be usefully borne in mind. The test is, was the agreement to pay the damages for the breach of covenant or contract unconscionable and extravagant, such as no Court ought to allow to be entered into. No hard-and-fast rule can, however, be laid down as to what may or may not be unconscionable or extravagant to insist upon in the circumstances of the particular case. As Lord Halsbury said in *Clydebank Engineering Co.* v. *Don Jose Castaneda* (2), it is impossible to lay down any abstract rule as to what it may or may not be extravagant or unconscionable to insist upon, without reference to the particular facts and circumstances which are established in the individual case. In the same case, Lord Davey added: "You are to consider whether it is extravagant, exorbitant or unconscionable at the time when the stipulation is made, that is to say, in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract." It need not be disputed that a stipulation for merely accelerating payment of the whole debt in default of payment of one or more instalments is not, by itself, by way of penalty: *Ex parte Burden* (3), *Sterne* v. *Beck* (4), *Wallingford* v. *Mutual Society* (5);

(1) [1912] A. C. 394.
(2) [1905] A. C. 6.
(3) (1881) 16 Ch. D. 675.
(4) (1863) 1 De G. J. & S. 595.
(5) (1880) L. R. 5 A. C. 685.

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illustration (*f*) to section 74 of the Indian Contract Act. But the position is very different, when the entire sum, which the creditor had agreed to receive in instalments, without interest, is not only made repayable in one sum, but is also made to carry interest at an unusual rate. The Court may, in view of all the circumstances of the case, regard the stipulation for payment of interest at an exorbitant rate as penalty. In the case before us, the history of the previous transactions between the parties shows that a very considerable portion of the sum (Rs. 1,500) secured by the mortgage was interest on the original sums advanced by way of loan. The decree, which had been obtained by the creditors, carried interest at 6 per cent. per annum, while the promissory note carried interest at such an exorbitant rate (570 per cent. per annum) that no Court could possibly enforce payment thereof; when the creditors received payment of Rs. 100 in cash and agreed to receive the balance (Rs. 1,500) in instalments, without further interest, spread over five years, the transaction was by no means too favourable to the debtors who were made to furnish ample security. In these circumstances, when the stipulation was made that upon default of payment of one or two instalments, not only would the whole balance due become forthwith payable, but would carry interest at the rate of 75 per cent. per annum, we may properly hold that the covenant for payment of interest at this rate was a penalty, that is, it does not represent the damage which the creditors were likely to suffer by reason of the default of the debtors, but was rather intended as an effective means to secure punctual performance of the contract. In our opinion the Subordinate Judge very properly declined to allow the plaintiffs interest at 75 per cent. per annum.

The second contention of the respondents is that

the Court should decline to enforce the covenant for payment of interest at 75 per cent. per annum in view of the provisions of section 16 of the Indian Contract Act as amended in 1899. There is considerable force in this contention, as the case is of the type mentioned in Illustration (*c*) of section 16. We need not dwell at length, however, on this aspect of the case; it is sufficient to point out that when the mortgage was executed for Rs. 1,500, the debtors were in a position of extreme embarrassment. The creditors held a decree which they could execute any moment and sell up their properties, and the case for the defendants is that they threatened to do so. At the same time, the creditors held a promissory note which carried interest at the ruinous rate of 570 per cent. per annum. There can be no question that the creditors were in a position to dominate the will of their debtors, within the meaning of section 16, and although the latter furnished ample security, the creditors made the best bargain they could; they obtained a covenant for interest at 75 per cent. that is, interest at the very rate which had been disallowed by the Court in 1901, even when they were in the position of unsecured creditors. It need not be disputed, as has been repeatedly laid down, that urgent need of money on the part of the borrower does not, of itself, place the lender in a position to dominate his will within the meaning of section 16 [*Sundar Koer* v. *Rai Sham Krishen* (1), *Ganesh* v. *Vishnu* (2), *Umesh Chandra* v. *Golap Lal* (3), *Chatring* v. *Whitchurch* (4), *Debi* v. *Ganga* (5), *Meghraj* v. *Ganga* (6), *Megh Raj* v. *Hargayan*, (7) *Sri Chand* v. *Niader* (8)]; but in the case before

(1) (1906) I. L. R. 34 Calc. 150.; L. R. 34 I. A. 9.
(2) (1907) I. L. R. 32 Bom. 37.
(3) (1903) I. L. R. 31 Calc. 233.
(4) (1907) I. L. R. 32 Bom. 208.
(5) (1910) I. L. R. 32 All. 589.
(6) (1910) 7 All. L. J. 729.
(7) (1910) 7 All. L. J. 655.
(8) (1911) 8 All. L. J. 407.

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us, it is not necessary for the debtors to rely upon this doctrine; here the facts make it clear that the creditors were in a position to take advantage of the embarrassment of their debtors and the bargain they made was unconscionable; consequently, there is a concurrence of the two elements which must combine to attract the operation of section 16: *Davis* v. *Maung Shwe Goh* (1), *Kesavulu Naidu* v. *Arithulai Ammal* (2).

We desire to add, however, that the decree of the Subordinate Judge is erroneous, and if there had been a cross-appeal by the defendants, we would have varied it. The Subordinate Judge has allowed interest at 24 per cent. per annum till realisation. This is clearly wrong. Interest at such rate should have been allowed only up to the date fixed for repayment and redemption by the decree, and interest thereafter should have been allowed only at 6 per cent. per annum. We are also of opinion that the rate of 24 per cent. allowed by the Subordinate Judge is too high, in view of the facts that the sum secured by the mortgage was composed largely of interest at a high rate on the original loans, and that the debtors had furnished ample security; the justice of the case would have been met if interest had been allowed at 12 per cent. Finally, the Subordinate Judge has allowed the plaintiffs full costs of the suit (inclusive of the court-fees and hearing fee), though he has decreed the claim for less than half the amount; in ordinary course, each party should have been allowed costs, to the extent of his success; at any rate, the plaintiffs should not have got costs on the amount not decreed in their favour. It is thus plain that the appellants have no reason whatever to complain of the decree of the Subordinate Judge, which is really too favourable to them.

(1) (1911) I. L. R. 38 Calc. 805; L. R. 38 I. A. 155.

(2) (1912) I. L. R. 36 Mad. 533.

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The result is that this appeal fails and is dismissed with costs.

BEACHCROFT J. I agree on the ground that the provision for interest at 75 per cent. was a stipulation by way of penalty.

G. S. *Appeal dismissed.*

CRIMINAL REVISION.

Before Sharfuddin and Teunon JJ.

1914

July 23.

GIRISH CHANDRA RAY

v.

SARAT CHANDRA SINGH.*

Sanction for Prosecution—Offences committed in the Court of a Deputy Magistrate—Transfer of same from the sub-division—Successor in office—Application for sanction to another Deputy Magistrate, subsequently posted to the sub-division—Power of latter to grant sanction—Criminal Procedure Code (Act V of 1898), s. 195.

Where there are several Deputy Magistrates at a place, and one of them is transferred, the Deputy Magistrate who comes to fill the gap is not the successor in office of the outgoing Magistrate.

Mohesh Chandra Saha v. *Emperor*(1) referred to.

Where a proceeding under s. 107 of the Code, during the course of which a forged pottah was filed and evidence given in support thereof, was disposed of by H. K. G., a Deputy Magistrate, who became afterwards the officer next senior to the Subdivisional Magistrate, and on the transfer of the former, two other Deputy Magistrates became successively the next senior officers, and ultimately K L. M., a Deputy Magistrate, joined the subdivision as the next senior officer, and an application was made to him

* Criminal Revision No. 804 of 1914 against the order of Khirode Lal Mukherjee, Deputy Magistrate of Comilla, dated April 18, 1914.

(1) (1908) I. L. R. 35 Calc. 457, 460.

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for sanction to prosecute the petitioners for offences, under ss. 471 and 193 of the Penal Code, committed in the Court of H. K G. :—

Held, that K. L M. was not the successor in office of H. K. G., and had no power to grant sanction under the circumstances.

IN 1912 a proceeding under s. 107 of the Code was instituted in the Court of Babu Harendra Kumar Ghose, a Deputy Magistrate of the fourth grade, exercising first-class powers at the Sadar station of Comilla, against the first petitioner, Girish Chandra Ray. During the pendency of the case the second petitioner, who was the latter's servant, was alleged to have filed a certified copy of a *pottah*, purporting to have been executed in favour of the first petitioner's grandfather, with a list of documents signed by the first petitioner, and to have given evidence in support of the deed. The Magistrate discharged the accused on the 13th November 1912, but the genuineness of the document having been impeached, a departmental enquiry was set on foot, and it was discovered that a forged *pottah* had been substituted in the Registers for the original, and corresponding alterations made in other records kept in the Sub-Registry Office at Comilla.

In the meantime the Sadar station was created a subdivision on the 1st January 1913. Of the Deputy Magistrates then stationed at headquarters, Babu Prokash Chandra Singh was made Subdivisional Officer, and Babu H. K. Ghose and Babu S. K. Chakravarti, a Deputy Magistrate of the sixth grade, with second-class powers, were appointed by the District Magistrate to act therein. There was no formal classification made of the officers in the subdivision, but Babu H. K. Ghose was in point of fact the officer next senior to the Subdivisional Magistrate, and held charge of the subdivision during the absence, on tour, of the latter, and was considered, in this sense, to be

the "second officer." On the 7th June 1913, Babu H. K. Ghose made over charge, on transfer to Barisal, and Babu S. K. Chakravarti then became the next senior and accordingly the "second officer." Some of the cases pending in the file of the outgoing Magistrate were made over to him and the rest to other Magistrates in the subdivision for disposal. On the 20th September 1913, Mr. J. W. McDermott, a Deputy Magistrate of the sixth grade with first-class powers, but junior to Babu S. K. Chakravarti, joined the subdivision. The latter was vested with first-class powers on 12th November 1913, and transferred to Mymensingh, making over charge on the 23rd December. Thereupon Mr. McDermott became the next senior, and thus the "second officer." On the 6th April 1914, Babu Khirode Lal Mukherjee, a Deputy Magistrate of the fifth grade, with first-class powers, took charge in the subdivision and became the next senior or the "second officer." The notifications in the Calcutta Gazette of the transfers from, and appointments to, the subdivision of these several Deputy Magistrates were in general terms, and did not purport to appoint any particular officer in place of any other officer. On the 18th instant, an application was made to Babu K. L. Mukherjee by the District Sub-Registrar of Comilla for sanction to prosecute the petitioners for offences under ss. 471 and 193 of the Penal Code committed in the section 107 proceeding in the Court of Babu H. K. Ghose. He issued notices on the petitioners to show cause, and proceeded to hold a preliminary enquiry. The petitioners thereupon moved the High Court which at first directed the District Magistrate to state whether and in what sense Babu K. L. Mukherjee was the "successor in office" of Babu H. K. Ghose, and on receipt of the explanation, issued a rule in the terms set forth in the judgment below.

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In one of the explanations submitted by the District Magistrate, he stated that, when a Deputy Magistrate leaves or arrives, he does not make over charge to, or take it over from, any particular officer.

Mr. E. H. Monnier, for the Crown (after stating the facts). Sanction is not necessary for the prosecution of the second petitioner under s. 471 of the Penal Code, he having been a witness and not a party to the s. 107 proceeding, but only for his prosecution under s. 193 and that of the first petitioner under s. 471 of the Penal Code: see *Debi Lal* v. *Dhajadari Gashai* (1). In s. 195 of the Criminal Procedure Code the word "Court" includes the successor. The Code does not, however, define the term "successor," the only provisions in it relating thereto being those contained in ss. 11 and 350. In some of the rulings under the latter section, "successor" has been described as one *who succeeds to the office* of another, *e.g.*, *Queen-Empress* v. *Radhe* (2), but this definition has not been accepted, *even under s. 350*, in the recent Calcutta decisions which have laid down that a Magistrate to whom a case has been transferred under s. 528 is a successor to the Magistrate from whose file it has been removed: see *Mohesh Chandra Saha* v. *Emperor* (3). As remarked in this decision, Deputy Magistrates do not succeed each other, and hence *in the case of such Magistrates* the test of succession to office does not apply in determining the meaning of the word "successor." For the purposes of s. 195 "successor" cannot be limited to an officer succeeding to the post of another. In the first place such a meaning would be inapplicable to a Court composed of several Judges exercising jurisdiction in it as the

(1) (1911) 15 C. W. N. 565. (2) (1889) I. L. R. 12 All. 66, 68.
(3) (1908) I. L. R. 35 Calc. 457.

Court of Session or the Presidency Small Cause Court. It has been held, with reference to the latter in *Emperor* v. *Molla Fuzla Karim* (1), that the Chief Judge may grant sanction for an offence committed before the Registrar of the Court who was at the time on furlough. Next, applying by analogy the principle of the actual decision in *Mohesh Chandra Saha* v. *Emperor* (2), a "successor" for the purposes of s. 195 would also be a Magistrate to whom a case had been transferred under s. 528. The word "successor" may also mean one who *follows or comes next*, as in the expression "succeeding year." This interpretation was laid down in *Overseers of East Dean* v. *Everett* (3) and is supported by *Ali Mohomed Khan* v. *Tarak Chandra Banerji* (4), where there was only one Magistrate at the station. In this case Government Notifications 806A and 807A, published in the Eastern Bengal and Assam Gazette, Part I, p. 341, merely appointed one Deputy Magistrate in the subdivision to be the Personal Assistant to the Commissioner and posted another to the same subdivision, generally, and not "in place of" the latter, yet one was held to be the successor of the other.

If the identity of a Court under s. 195 is to be determined exclusively by the test of succession to office, there will be a failure of justice in the case of the death or transfer, or retirement of the Deputy Magistrate before whom the offence was committed, as the power of a Superior Court to grant sanction in such cases may be questioned unless there was a proceeding before it by way of appeal from the decision in the original case or otherwise [see *Bhadesar Tiwari* v. *Kampta Prasad* (5)], and s. 476 requires the pendency

(1) (1905) I. L. R. 33 Calc. 193.
(2) (1908) I. L. R. 35 Calc. 457.
(3) (1861) 3 E. & E. 574.
(4) (1908) 13 C. W. N. 420.
(5) (1912) I. L. R. 35 All. 90.

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of a *judicial proceeding*; and in its absence a Court could not take action thereunder. Even if succession to office is necessary, Babu K. L. Mukherjee may, on the particular facts of the case, be treated as the successor of Babu H. K. Ghose. Though there was no formal classification of Deputy Magistrates as first and second Courts, yet the latter was the officer next senior to the Subdivisional Magistrate, and the former occupies that position now. The fact of both Magistrates being next in seniority to the Subdivisional Magistrate and thereby officers in temporary charge of the subdivision affords ground of distinction between the second and other officers in the subdivision sufficient to constitute one second officer the successor of the other and the Court of one identical with the Court of the other.

Mr. Jacob (with him *Babu Manmatha Nath Mukerjee* and *Babu Jatindra Mohan Ghose*), for the petitioner. There is no succession in office in the case of Deputy Magistrates, and Babu K. L. Mukerjee is not, therefore, the successor of Babu H. K. Ghose. Relies on *Mohesh Chandra Saha* v. *Emperor* (1) and *In re Debi Prasad* (2).

Mr. Monnier, in reply. The principle of *In re Debi Prasad* (2) is opposed to the actual ruling in the Calcutta case cited by my friend, besides the two Magistrates in the Allahabad case were of different ranks.

SHARFUDDIN AND TEUNON JJ. The petitioners applied to this Court for a Rule to quash the proceedings now pending against them and, on their application, we ordered, on the 18th of May last, that a copy of the petition should be forwarded to the District Magistrate with a request that he should state whether

(1) (1908) I. L. R. 35 Calc. 457. (2) (1902) All. W. N. 9.

and in what sense Babu Khirode Lal Mukherjee was the successor in office of Babu Harendra Kumar Ghose. A long letter was received by this Court from the Magistrate giving us all information tending to show that Babu Khirode Lal Mukherjee was the successor in office of Babu Harendra Kumar Ghose. Then we issued the present Rule, on the 10th of June, on the District Magistrate and on the opposite party, to show cause why the proceedings preliminary to the granting of sanction should not be quashed on the ground that Babu Khirode Lal Mukherjee was not the successor in office of Babu Harendra Kumar Ghose.

Now, the whole matter has been argued before us. The case stands thus. There was a case under section 107 of the Criminal Procedure Code in which a certain document, namely, a *pottah* was used by the petitioners; and the present proceedings are to determine whether sanction should or should not be given for the prosecution of the petitioners for their use of that *pottah*, which is alleged to be a forged document, as a genuine document, in the said case. Now, that case was disposed of by Babu Harendra Kumar Ghose. The application for sanction was put in before Babu Khirode Lal Mukherjee. The question is whether Babu Khirode Lal Mukherjee is the successor-in-office of Babu Harendra Kumar Ghose or not. On behalf of the opposite party a lengthy argument has been placed before us in order to show that Babu Khirode Lal Mukherjee is the successor-in-office of Babu Harendra Kumar Ghose. We are, however, of opinion that in the present case Babu Khirode Lal Mukherjee can not be said to be the representative-in-office of Babu Harendra Kumar Ghose. In the case of *Mohesh Chandra Saha* v. *Emperor* (1), it has been held that where there are many Deputy Magistrates, and one of

(1) (1908) I. L. R. 35 Calc. 457, 460.

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them is transferred, the Deputy Magistrate who comes to fill the gap is not the successor in office of the Deputy Magistrate who has been transferred. Under the circumstances we hold that Babu Khirode Lal Mukherjee is not the proper officer to grant sanction for the prosecution of the petitioners in respect of their use of the document in the proceedings under section 107 of the Criminal Procedure Code before Babu Harendra Kumar Ghose.

Now, the present proceedings are under section 195 of the Criminal Procedure Code. Under clauses (*b*) and (*c*) of sub-section (*1*) of that section, the proper Court to give sanction is either the Court where the offence is said to have been committed or the Court to which such Court is subordinate. Sub-section (*7*) of section 195 of the Criminal Procedure Code clearly lays down that "for the purpose of that section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie." The proceedings in the course of which the offence is said to have been committed were before Babu Harendra Kumar Ghose. It is not for us to do more than point out the law on the subject, and it is for the parties, if they are so advised, to act under the sub-sections and clauses to which we have referred. The rule is, therefore, made absolute and the proceedings quashed.

E. H. M. *Rule absolute.*

APPELLATE CIVIL.

Before Fletcher and Richardson JJ.

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v.

SECRETARY OF STATE FOR INDIA.*

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July 27.

Appeal—Additional Evidence—Civil Procedure Code (Act V of 1908) O. XLI, r. 27; O. XLVII, r 1—Jurisdiction of Appellate Court to admit additional evidence—Application to admit additional evidence before the hearing of the appeal, if it can be entertained.

Where in an appeal an application was made before the hearing of the appeal for the admission of additional evidence :

Held, that such an application was not warranted by the terms of O. XLI, r. 27, and the Appellate Court had no jurisdiction to entertain it.

O. XLI, r. 27, does not authorise an Appellate Court to admit fresh evidence, documentary or oral, and whether or not it was in existence at the time of the judgment of the lower Court or at the time the appeal was preferred, unless the Appellate Court after examining the evidence on the record comes to the conclusion that it requires the additional evidence in order to enable it to pronounce judgment, namely, that there is a defect on the evidence on the record.

An application to admit fresh evidence discovered out of Court by the parties comes under O. XLVII, r. 1. and not under O. XLI, r. 27.

Kessowji Issur v. *Great Indian Peninsula Railway Co.* (1) referred to.

APPLICATION by the Garden Reach Spinning and Manufacturing Co., the appellants.

The appellants were the proprietors of a cotton mill situated at Garden Reach and of about 26½ bighas of land on a part of which the cotton mill

*Application in Appeal from Original Decree No. 400 of 1911, against the decree of A. Goodeve, Land Acquisition Judge, 24-Parganas, dated June 2, 1911

(1) (1907) I. L. R. 31 Bom. 381 ; L. R. 34 I. A. 115.

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stood. Adjoining the appellants' property on the west was a piece of land the property of the British India Steam Navigation Company, Limited, which was used by that Company as a coal depôt and was known as "Bracebridge Hall." The area of the Bracebridge Hall property was about 114 bighas, and consisted of two plots containing respectively about 26½ bighas and 87¼ bighas. The smaller plot and the appellants' property were practically identical in area and similar in situation, as both were bounded on the south by the Garden Reach Road and on the north by the river Hughli. Both properties were included in a scheme for the acquisition of 5,500 bighas of land at Garden Reach by the Commissioners for the Port of Calcutta. A declaration for the acquisition of this land under the Land Acquisition Act was published in the *Calcutta Gazette* on the 30th May 1906 ; but it was not until the 8th March 1909 that notices under the Land Acquisition Act were served upon the appellants, and the British India Steam Navigation Company to submit their claims for compensation. The appellants and the British India Steam Navigation Company submitted their respective claims to the Land Acquisition Collector ; the claim of the appellants amounted to Rs. 14,66,907, and that of the British India Steam Navigation Company to Rs. 1,22,40,786.

On the 7th February 1910, the Collector published his awards in respect of the two claims. To the appellants the Collector awarded Rs. 2,38,625 for their land alone, which he valued at Rs. 450 per cottah ; and the total amount awarded to the appellants was Rs. 6,18,848-8-9. To the British India Steam Navigation Company the Collector awarded in respect of the smaller plot, comprising about 26½ bighas, which was contiguous to the appellants' property, Rs. 2,39,531-14, which he also asssessed at Rs. 450 per cottah, and

Rs. 4,18,730 for the larger plot, which the Collector valued at Rs. 240 per cottah. The total amount awarded to the British India Steam Navigation Company was Rs. 14,48,628-14-3.

Both the appellants and the British India Steam Navigation Company filed petitions under s. 18 of the Land Acquisition Act praying that the respective awards should be referred to the Court for determination. The case of the appellants was first taken up by the Land Acquisition Judge who, on the 23rd June 1911, decreed an additional sum of Rs. 46,258 for structures only, but otherwise maintained the Collector's award and upheld the valuation of Rs. 450 per cottah. The appellants appealed.

The case of the British India Steam Navigation was to have been heard by the Land Acquisition Judge on the 13th December 1911, but negotiations which had been pending between that Company and the Port Commissioners culminated in a settlement of that case with the result that a decree by consent was granted on the 30th April 1912 by the Land Acquisition Judge in favour of the British India Steam Navigation Company for Rs. 28,00,000.

In connection with their appeal from the judgment of the Land Acquisition Judge, the appellants submitted two petitions dated respectively 16th July 1912 and 1st May 1914, in which they applied to submit as additional evidence at the hearing of their appeal certain documents relating to the negotiations and the decree that had been passed in the case of the British India Steam Navigation Co. The application was opposed by the respondent. It was heard on the 21st and 22nd July 1914.

Mr. L. P. E. Pugh (with him *Mr. W. M. Cubitt*, *Babu Surendra Nath Roy*, *Babu Satyendra Nath*

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Roy and *Babu Narendra Nath Sett*), for the applicants. The evidence that we wish to put in are documents relating to the negotiations which led up to the settlement of the case between the Port Commissioners and the British India Steam Navigation Company. This evidence is material to our case, since it clearly supports our contention that the valuation allowed by the Collector and the Land Acquisition Judge for our land was greatly under-estimated. The compromise shows that for practically an identical piece of land to ours the Port Commissioners agreed to pay Rs. 1,350 a cottah. Some part of the evidence was not in existence when this appeal was filed. It is submitted that unless evidence is given of the price paid for the plot of land adjoining our property, there is a lacuna in the evidence on the record, and the Court cannot pronounce judgment.

Mr. S. P. Sinha (with him *Mr. A. Casperz*, *Babu Ram Charan Mitra* and *Babu Ambica Pada Chaudhri*), for the Secretary of State. This application should be rejected, because (*a*) it is premature, (*b*) the evidence is inadmissible, and (*c*) even were the evidence admitted, it does not support the contention that the Port Commissioners paid for similar land three times as much as has been allowed for the land of the appellants. The Court must be satisfied that additional evidence is required to enable it to pronounce judgment and that a lacuna or defect in the evidence on the record is apparent: see *Kessowji Issur* v. *The Great Indian Peninsula Railway Company* (1) and *Jagarnath Pershad* v. *Hanuman Pershad* (2).

[FLETCHER J. The distinction is that the evidence in this case did not come into existence until after the appeal had been filed.]

(1) (1907) I. L. R. 31 Bom. 381; (2) (1909) I. L. R. 36 Calc. 833. L. R. 34 I. A. 115.

The application should have been made under Order XLVII, rule 1. The appellants should have withdrawn their appeal and asked for a review of judgment. They cannot use the procedure which applies to applications for a review to help them to get in further evidence under an appeal. The Court must first deal with the appeal on its merits, and only allow further evidence if for substantial reasons it is required by the Court: see *Sreeman Chander Dey* v. *Gopaul Chander Chuckerbutty* (1) and *Ganga Govind Mandul* v. *The Collector of the Twenty-four Pargunnahs* (2).

[*Mr. Sinha* then proceeded to contend that the evidence which the appellants wished to put in, even if admitted, did not support the case put forward by the appellants.]

Mr. Pugh, in reply. The evidence which we seek to have admitted is evidence of a transaction which shows the price paid for land adjoining ours, and should be considered with other evidence. Such evidence can be admitted under O. XLI, r. 27 "for substantial reason": see *Morgan* v. *Morgan* (3). He also referred to *In re Wiltshire Iron Company* (4).

[FLETCHER J. In England you cannot ask for a review of judgment; you ask for appeal on the ground of new evidence. Here the document was not in existence.]

In the cases of *Ram Ratan Sahu* v. *Mohant Sahu* (5), *Hazari Mall* v. *Janaki Prasad* (6), *Ramyad Sahu* v. *Bindeswari Kumar Upadhay* (7) and *Udit Chobey* v. *Rashika Prasad Upadhya* (8), in which O. XLVII, r. 1, had been discussed and it was held that it was

(1) (1866) 11 Moo. I. A. 28, 48.
(2) (1866) 11 Moo. I. A. 345, 368.
(3) (1882) I. L. R. 4 All. 306.
(4) (1868) 3 Ch. App. 443, 449.
(5) (1907) 6 C. L. J. 74.
(6) (1907) 6 C. L. J. 92.
(7) (1907) 6 C. L. J. 102.
(8) (1907) 6 C. L J. 662.

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not only competent to a Court of Appeal, but it may be its duty, under certain circumstances, to take notice of events which have happened since the order challenged in appeal was made. He also referred to the case of *Kotaghiri Venkata Subbamma Rao* v. *Vellanki Venkatarama Rao* (1), and *Kessowji Issur* v. *The Great Indian Peninsula Railway Company* (2), to show that O. XLVII, r. 1 does not authorize the review of a decree, which was right when made, on the ground of the happening of some subsequent event. The only question is whether the fresh evidence is material and necessary to enable the Court to pronounce judgment.

Cur. adv. vult.

FLETCHER J. This is an application by the appellants for the admission of certain additional evidence in an appeal we are about to hear.

The appeal itself is with reference to the amount to be paid by the Government as compensation for the property of the appellants which has been compulsorily acquired under the provisions of the Land Acquisition Act. The fresh evidence that the appellants wish to adduce consists of certain documents leading up to and resulting in a compromise of another case with reference to the acquisition of the premises of the British India Steam Navigation Company which adjoin the premises of the appellants.

The compromise with the British India Steam Navigation Company had not been arrived at when the lower Court gave judgment, nor when the appeal was filed in this Court. The present application is opposed by the Secretary of State for India in Council, the respondent to the present appeal.

(1) (1900) I. L. R. 24 Mad. 1. (2) (1907) I. L. R 31 Bom. 381.

Now the powers of an Appellate Court in India to admit further evidence are governed by the provisions of O. XLI, r. 27, which, so far as material, is in the following terms:—

"(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

"(*b*) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined."

The wording of the rule shows clearly that the power of an Appellate Court to admit further evidence is a very restricted one.

In the first place, the rule prohibits the parties to the appeal from producing further evidence.

Next, the power of the Court to admit further evidence is only in case the Appellate Court "requires" the additional evidence "to enable it to pronounce judgment or for any other substantial cause."

As has been pointed out, the word "requires" plainly means "needs or finds needful." When therefore can the Appellate Court "require the additional evidence to enable it to pronounce judgment or for any other substantial cause"? Manifestly not until the Appellate Court has examined the evidence on the record and comes to the conclusion that the evidence as it stands is inherently defective. Until the Court has therefore examined the record, it is not in a position to say, whether the evidence is inherently defective and that it will require the further evidence to enable it to pronounce judgment or for any other substantial cause. A preliminary application such as the present is not warranted by the terms of O. XLI, r. 27.

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An application to admit fresh evidence discovered out of Court by the parties comes under O. XLVII, r. 1, not under O. XLI, r. 27.

It is said that the evidence was not in existence at the date of the trial and the case of *Kotaghiri* v. *Vellamki* (1) was cited to show that such evidence is not admissible by way of review. The point does not arise in the present case and it is not necessary for us to decide whether such view is correct or not.

O. XLI, r. 27, does not, I think, authorise an Appellate Court to admit fresh evidence, documentary or oral, and whether or not it was in existence at the time of the judgment of the lower court or at the time the appeal was preferred unless the Appellate Court after examining the evidence on the record comes to the conclusion that it requires the additional evidence in order to enable it to pronounce judgment, namely, that there is a lacuna or defect on the evidence on the record.

This appears to me to be the effect of the decision of the Privy Council in the case of *Kessowji Issur* v. *Great Indian Peninsula Railway Co.* (2). I can find nothing in the judgment of their Lordships to suggest that new evidence discovered out of Court by the parties but which only came into existence after the filing of the appeal can be admitted on a preliminary application by the parties to the Appellate Court. Such a suggestion is negatived by the express words in O. XLI, r. 27, that "the parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary in the Appellate Court."

I think, therefore, that we have no jurisdiction to assent to the present application. But even if we had such jurisdiction, I should, on the materials before us,

(1) (1900) I. L. R. 24 Mad. 1, 10. (2) (1907) I. L. R. 31 Bom. 381.

refuse this application. The evidence the appellant company wish to put forward is to the following effect:—

The British India Steam Navigation Co. were the owners of the premises adjoining those of the appellant company. Both the British India Co. and appellant company are represented in Calcutta by Messrs. Mackinnon, Mackenzie & Co., as also in London, although apparently the two companies have different Boards of Directors in London,

On the premises adjoining those of the appellant company, the British India Co. had a considerable coal business chiefly for the purpose of coaling their extensive fleet. This property of the British India Co. is known as "Bracebridge Hall."

The same declaration under the provisions of the Land Acquisition Act was made in respect of the property of the appellant company, Bracebridge Hall and various other properties.

The British India Co. after the declaration preferred a claim for a very large sum amounting in the first instance to over one crore and 22 lakhs of rupees.

An award of 14 lakhs odd of rupees was made by the Land Acquisition Collector. The British India Company then required the matter to be taken before the Special Land Acquisition Judge. Negotiations were then opened between Sir Frederick Dumayne on behalf of the Calcutta Port Commissioners on the one hand, and in the first instance with Mr. Alexander McLaurin Monteath and subsequently Lord Inchcape on behalf of the British India Co. on the other hand. After long and protracted negotiations the case of the British India Co. was subsequently settled by a cash payment of 28 lakhs of rupees to the British India Co.; and the grant of certain facilities

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by the Port Commissioners with reference to the coaling of the fleet of the British India Co. It is now alleged that the facilities granted to the British India Co. are more valuable than those enjoyed by them at Bracebridge Hall, and therefore the whole of the 28 lakhs was awarded in respect of the other items of their claim. On this footing, it is said that the Port Commissioners have paid the British India Co. in respect of the site of the Bracebridge Hall an amount three or four times larger than the amount paid to the appellant company, when in fact the land of the appellant company and Bracebridge Hall must be of substantially the same value. The appellant company, therefore, desire to give in evidence certain documents relating to the compromise of the claim of the British India Co. Two affidavits have been filed on the present application, one by Mr. Alexander McLaurin Monteath in support of the application and the other by Sir Frederick Dumayne in opposition thereto. Sir Frederick Dumayne is the Vice-Chairman and Chief Executive Officer of the Port Commissioners. There is a conflict between the statements contained in the affidavit of Mr. Monteath and those in the affidavit of Sir Frederick Dumayne. Now, it appears from the evidence that the negotiations, which led to the settlement with the British India Co., were opened early in January 1911. The negotiations no doubt were stated by Sir Frederick Dumayne to be "without prejudice to either side" and "confidential." Mr. Sinha, on behalf of the Government, has argued that this would render all correspondence which passed between the parties thereto incapable in any event of being used in evidence even when a settlement was arrived at. I think Mr. Sinha placed his case too high. The affidavits do establish, however, that in addition to the

correspondence interviews took place in the first instance between Monteath and Sir Frederick Dumayne with a view to a settlement of the case of the British India Co.

The negotiations in India closed in May 1911.

In June 1911, Sir Frederick Dumayne proceeded to England. It appears from his affidavit that the Port Commissioners had directed him to see Lord Inchcape with reference to compromising the British India Company's case. He was also authorised to go as far as to make an offer of 25 lakhs of rupees for that purpose. Lord Inchcape and Sir Frederick Dumayne arrived finally at a settlement, viz., that the Port Commissioners should pay to the British India Co. 28 lakhs of rupees and give to the British India Company certain facilities. Sir Frederick Dumayne has sworn in his affidavit that in the settlement he never contemplated paying 28 lakhs of rupees for the land, structures and machinery of the British India Co., but that he agreed to this sum as a settlement of the whole case.

Lord Inchcape has not made an affidavit as to what took place between himself and Sir Frederick Dumayne. The Port Commissioners sanctioned with reluctance the settlement arrived at between Lord Inchcape and Sir Frederick Dumayne and recommended it to the Government for sanction and approval. The settlement was subsequently approved of by the Government. This, however, was after the present case had been decided by the Special Judge and the present appeal filed.

Much stress had been laid by the appellants on the proceedings of the Special Land Acquisition Committee of the Port Commissioners of the 20th October 1911. No doubt the record of the proceedings is not very happily worded, but I cannot imagine that a public

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body like the Port Commissioners intended to pay the British India Co. for their land a sum so vastly in excess of what they were paying to other parties and which would in the end result in their having to pay excessive sums for other lands acquired by them. For if this 28 lakhs was in fact paid only for the land, structures and machinery, this fact would be used in subsequent cases against the Port Commissioners as to the value of the lands acquired by them.

Sir Frederick Dumayne has sworn that he was fully cognisant of the prices paid by the Port Commissioners on other acquisitions and that what he wanted to settle was the whole case against the Commissioners.

The total claim preferred by the British India Co. amounted to Rs. 1,22,40,786-11-10. A large number of the items in the claim would appear to be altogether untenable. One of the items in the claim was a sum of Rs. 37,01,940 "for loss of time." This item was claimed for the difference between the time it would take to bring the vessels of the British India Co. alongside at Bracebridge Hall and that required to take them into the docks of the Commissioners.

It is difficult to imagine on what principle such a claim could be supported. The Port Commissioners were, however, in this difficulty that the Collector had allowed the sum of Rs. 1,27,140-10-0 in respect of this item and so had admitted the claim in principle. The Court under the provisions of the Land Acquisition Act has no jurisdiction to reduce the amount awarded by the Collector and it may perhaps be doubted whether the Court has jurisdiction to re-allot over the different items of claim the aggregate amount allowed by the Collector. All the probabilities therefore suggest that the story told by Sir Frederick Dumayne in his affidavit that what he settled with Lord Inchcape was the whole case

between the British India Co. and the Port Commissioners and that the sum of 28 lakhs of rupees was not paid to British India Co. in respect of the land, machinery and structures only, is correct. The only person who could have contradicted Sir Frederick Dumayne as to the terms arrived at in London between Lord Inchcape and himself, would be Lord Inchcape. If therefore we were to decide to permit the appellant company to adduce further evidence it would have to be the evidence of Lord Inchcape as to what were the terms of settlement between himself and Sir Frederick Dumayne. In that event, such evidence would have to be tested in the ordinary manner by cross-examination.

The letters that passed between Lord Inchcape and Sir Frederick Dumayne dated the 26th of January and the 13th of February 1912 suggest that Lord Inchcape did not consider that the sum of Rs. 28 lakhs had been paid to the British India Co. in respect of Bracebridge Hall and the structures and machinery thereon.

The statements in Sir Frederick Dumayne's affidavit appear to me to agree with all probabilities of the case and are uncontradicted as to what was intended to be settled between him and Lord Inchcape. Even, therefore, if we have jurisdiction to admit this further evidence on the materials before us I should refuse the appellant company leave to do so.

The present application is therefore dismissed with costs.

RICHARDSON J. I entirely agree with Mr. Justice Fletcher, whose judgment I have had the advantage of reading, that the application before us is not one which we have jurisdiction to entertain under O. XLI, r. 27. And I will only add this that even if we had a power, co-extensive with the power of the Trial Court under

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O. XLVII to admit fresh evidence by way of review, I am not of opinion that the evidence tendered is evidence which ought to be admitted in the exercise of any such power. It is not evidence, the bearing of which on the issue which has to be determined is practically beyond the sphere of controversy or in any sense conclusive. On the contrary it is only necessary to read the affidavit on the one side and the counter affidavit on the other to show that matter is raised of a controversial and argumentative character. The question at issue is the market value of certain land at a certain date. The agreement which it is sought to put in (together with letters and other documents leading up to it) was arrived at in another case between parties one of whom is not a party to the present case and it was arrived at after the trial of the present case was concluded. By itself the agreement is of no use to the appellant company. It only shows that a lump sum was paid to the British India Co. in respect of the compulsory acquisition of their land and that in the same respect certain facilities were also promised to them by the Port Commissioners in connection with their coal tract. The land, it is true, adjoins the land of the appellant company. But the compensation which the British India Co. had claimed from the Collector was arranged under different heads many of which had nothing to do with the value of the land. Two or three items were withdrawn while the case was before the Collector, but the total claim which was subsequently carried before the Special Land Acquisition Judge was still very large. That claim was satisfied by the lump sum and the coaling facilities. Then comes the point how much of the money payment is to be allocated to the land? That depends on the further question what was the value assigned to the facilities? Both these questions

are in serious dispute, each side endeavouring to fasten upon the other its own interpretation of the agreement. As might have been expected, when such questions are debated between practical business-men, there is a good deal to be said—at any rate a good deal was said—on both sides. The difficulty of arriving at a decision as to what was paid for the land is not diminished by the reflection that it was not the actual value of the land and the actual value of the facilities that has to be considered, but what was in the minds of the parties to the agreement. What the appellant company is really trying to do is to fix upon the Port Commissioners an admission as to the value of the land acquired from the British India Co., and I merely add that for that purpose the value which the Port Commissioners attributed to the land (as to which Sir Frederick Dumayne's affidavit is entitled to the greatest weight) is more important than the value which the British India Co. may have attributed to the land. But to my mind the doubts and difficulties which surround the evidence tendered is not only no recommendation, but is a complete bar, to its reception at this stage, even, as I have said, if we had a power to receive fresh evidence such as that conferred on the Trial Court by O. XLVII.

W. M. C. *Application refused.*

APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

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July 27.

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v.

KHIRODE CHANDRA PAL.*

Interest—Contract Act (IX of 1872) ss. 16, 74—Undue influence, presumption of—Penalty—Excessive and usurious interest—Duty of the Court.

Where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate. The attempt to conceal the real rate of interest, by describing it as one pice in the rupee per mensem or as in the present case Rs. 5 per mensem, is evidence of an intention to get the better of the debtor. The law lays down that there must be a footing of complete equality between debtor and creditor and they must be, so to speak, at arm's length to make a bargain, which is in itself harsh and unconscionable, enforcible at law.

Carringtons, Ld. v. *Smith* (1), *In re a Debtor* (2) referred to.

Where there is ample security, an excessive rate of interest has been held to be anything over ten per cent. Where there is no security, no rate of interest can be considered excessive. There can be no standard rate on personal loans and where the parties are reasonably on terms of equality a Judge cannot do better than adopt what they themselves have agreed on, though, of course, when that is not the case he has to judge what is reasonable, as best he can and under all the circumstances.

Where the contract is for a temporary accommodation, the stipulation that interest is to run at Rs. 5 a month is one which necessitates the payment of interest not at 60 per cent. per annum, but at Rs. 5 in each month and a stipulation that in default of 12 months' instalments of interest, compound interest would begin to run is in the nature of a penalty. However

* Appeal from Appellate Decree, No. 533 of 1913, against the decree of R. N. Dutt, District Judge of Noakhali, dated Sept. 19, 1912, confirming the decree of Ambika Charan Mozumdar, officiating Subordinate Judge of Noakhali, dated Nov. 30, 1912.

(1) [1906] 1 K. B. 79. (2) [1903] 1 K. B. 705

technical this may be, it is the duty of the Courts in India to enforce the letter of the law against obviously harsh and unconscionable bargains of this nature.

The exploitation of the necessitous, of the careless and inexperienced is a trade to be extirpated in the interest of the whole community as contrary to individual morality, as well as to public policy.

Muthu Krishna Iyer v. *Sankaralingam Pillai*(1), *Samuel* v. *Newbold*(2), *Kesavulu Naidu* v. *Arithulai Ammal* (3) referred to.

SECOND Appeal by Abdul Majeed and others, the defendants.

This appeal arises out of a suit to recover Rs. 1,300—being the principal (Rs. 80) and interest due on a mortgage bond alleged to have been executed by the principal defendants (1, 2, 3) in favour of the plaintiffs on the 1st of Jaishta 1312. According to the terms of the bond, the defendants were to pay interest for the said sum at the rate of Rs. 5 per cent. per month; to pay up the entire money, principal and interest, within the month of Ashar of the said year; to pay the interest for each year within the said year; otherwise the interest on arrears was to be treated as principal carrying interest thereon at the aforesaid rate of Rs. 5 per cent. per month as compound interest. The bond was duly registered.

The defendant No. 4 was a *pro formâ* defendant. The mortgaged properties Nos. 1, 2, 3, and 4 were under a previous mortgage to him and he had obtained a decree for a heavy sum. The plaintiff, therefore, put in a separate prayer for the purpose of attaching the other immovable properties of the principal defendants before judgment.

The defendants admitted the loan and the execution of the bond, but they submitted that they were illiterate persons to whom the bond was never read over or

(1) (1912) I. L. R. 36 Mad. 229. (2) [1906] A. C. 461.
(3) (1912) I. L. R. 36 Mad. 533.

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explained. They denied having made any contract for payment of interest on interest.

The circumstances under which the money was borrowed were these. The three defendants had bid successfully at an auction sale and had deposited the earnest money. But they were in urgent need of Rs. 80 to complete the sale. They, therefore, applied to defendant No. 4 for a loan of Rs. 80 for one month. The defendant No. 4, representing himself as their patron, got a bond written out by his son Raj Kumar in the plaintiff's name, at an interest of Rs. 5 per cent. per month, for a term of one month and gave the required loan.

The stipulation for payment of interest on interest was inserted without their knowledge or consent and therefore the defendants challenged the plaintiff's claim for interest as excessive, illegal and fraudulent. But the previous malik of the auction-purchased land having deposited money, the auction purchase of the defendants became null and void. Hence the defendant No. 1, on withdrawing the money from the Court and with the object of taking back the bond, on satisfaction of the entire claim by making payment of the entire sum of Rs. 88 (inclusive of Rs. 8 as interest), brought the plaintiff to the house of Harish Chandra Pal, and in the month of Sraban 1312 offered payment of the aforesaid sum of Rs. 88 to the plaintiff in the presence of Harish Chandra Pal and wanted back the bond. Thereupon the plaintiff agreed to take interest at the rate of Rs. 2-8 per cent. from the month of Sraban 1312 in place of Rs. 5 per cent. per month, and on accepting Rs. 8, on account of interest, requested the defendants to re-pay the sum of Rs. 80 at an interest of 2-8 per cent. per month. Thus the defendants, induced by the plaintiff and Harish Chandra Pal, to accept the aforesaid arrangement, brought back the

principal sum of Rs. 80 without discharging the debt.

The defendants, therefore, submitted that since Sraban 1312, the plaintiff was not entitled to more than 2-8 annas per cent. per month.

The defendants submitted that it was a very hard and unconscionable bargain.

The Subordinate Judge of Noakhali decreed the suit with costs. The District Judge dismissed the appeal. Hence this Second Appeal.

Babu Ramesh Chandra Sen, for the appellants, contended that the bargain was a hard and unconscionable one. The defendants were illiterate persons and the bond was never read over or explained to them. Even assuming that defendant No. 1 was quite capable of taking care of himself, the Appellate Court has omitted to consider the case of defendants Nos. 2 and 3 and has not recorded any findings whether they understood the contents of the bond or whether it was read over to them. The security given was a very excessive one, and that in itself raises a presumption of undue influence. Apart from this presumption, the bond itself shows that it was a hard and an unconscionable transaction and that the plaintiff, a professional money-lender, took advantage of the position of the defendants. They were badly in want of money at the time. They required it to complete their purchase at an auction sale. Further, it was the case of the defendants that they actually wanted to pay off their entire debt in Sraban 1312, but they were persuaded by the plaintiff and Harish Chandra Pal not to do so, the plaintiff promising to reduce the interest from Rs. 5 to 2½ per cent. per month. The lower Appellate Court has erred in holding that the defendant could not prove the agreement of Sraban

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1312. It was a fresh contract for payment of interest at 2½ per cent. The agreement to pay compound interest on interest due was in the nature of a penalty, and therefore unenforceable: *Kali Prosonno Bhattacharjee* v. *Protap Singh Pathar* (1), *Dhanipal Das* v. *Maneshar Bakhsh Singh* (2), *Muneshar Bakhsh Singh* v. *Shadi Lall* (3), *Miaian Patari* v. *Abdul Jabbar* (4).

Babu Gunada Charan Sen, for the respondent. The contract was made by the parties with their eyes open. The Court will not make a contract for them. If they chose to pay a heavy rate of interest, it was their lookout. There is no evidence to show that any fraud was practised on the defendants. It has been found by both the Courts that the defendant No. 1 was a very intelligent person who could not easily be deceived or over-reached. The Courts below have rejected the story of the reduction of interest. The bond is not a hard and unconscionable bargain. Despite the fact that the defendants had the opportunity of paying off their debt, they did not do so. Upon the facts, both the Courts have found against the defendants. This is not a case for relief upon the grounds of the bargain being hard and unconscionable: *Sundar Koer* v. *Rai Sham Krishen* (5).

Cur. adv. vult.

HOLMWOOD AND CHAPMAN JJ. This appeal arises out of a suit brought by the plaintiff to recover Rs. 1,300, being principal Rs. 80 and interest Rs. 1,220 on a mortgage bond executed by three defendants on 1st Jaishta 1312.

(1) (1912) 17 C. L. J. 221.
(2) (1906) I. L. R. 28 All. 570.
(3) (1909) 13 C. W. N. 1069.
(4) (1906) 10 C. W. N. 1020.
(5) (1906) I. L. R. 34 Calc. 150.

The transaction was an unusual one, and the facts found require to be carefully stated as well as the circumstances which are admitted in connection with the giving of the mortgage bond and recited in the bond itself.

It appears that Abdul Majeed, defendant No. 1, mortgaged 6 annas of a raiyati jote in which his brother, defendant No. 2, was also interested, while defendant No. 3, a relative, mortgaged three six-annas shares of jotes and an eight-annas share of a howla belonging exclusively to him.

The three defendants had bid successfully at a sale of the land of one Nagorbashi Kundu and had deposited the earnest money. They were in immediate need of Rs. 80 to complete the purchase and applied to the former creditor of defendant No. 3, one Harish Chandra Pal, who had a mortgage on properties 1 to 4, on which he has, according to the plaint, recently got a decree for a heavy claim, and by him they were introduced to the plaintiff, another money-lender. The Rs. 80 was obviously only required as a temporary accommodation, and the security given was worth over Rs. 3,000 for the property No. 5 was sold under Harish Chandra Pal's decree for Rs. 650, and there are three similar jotes and a larger taluki interest also mortgaged, yet interest at 60 per cent. with compound interest was agreed to. The defendants' story is that the land they had purchased was released from sale by deposit of the decretal money by the original owner, and they therefore tendered the principal Rs. 80 and Rs. 8 interest to the plaintiff, who took the Rs. 8 and persuaded defendant No. 1 to let the principal sum stand over on promising to forego compound interest and to reduce the simple interest by half. This story has been disbelieved by the lower Courts as far as the payment of Rs. 8 and

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the oral agreement is concerned, but no finding has been come to as to the probability of the defendants having desired to pay off the debt when they had the money.

The lower Court has also held that no fraud was practised on the defendants, because defendant No. 1 is a very clever man and able to take care of himself and entered into the bond with his eyes open. But here the lower Court has fallen into the error of not considering the position of defendant No. 3, who had a far larger interest in the property mortgaged than anybody else and who is an ordinary cultivator.

Every presumption must be made in his favour, and the lower Court appears to have erred in not applying the doctrines of undue influence and penalty very strictly to his case. The trend of modern decisions is to hold that the Courts have ample powers under the amended Contract Act to go behind hard and unconscionable bargains on the ground that where there is ample security the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate. Further, it has been held that the attempt to conceal the real rate of interest by describing it as 1 pice in the rupee per mensem, or as in the present case Rs. 5 per mensem, is evidence of an intention to get the better of the debtor, and the law seems to be that there must be a footing of complete equality between debtor and creditor and they must be, so to speak, at arm's length to make a bargain which is in itself harsh and unconscionable, enforceable at law. We may refer to the case of *Carringtons, Limited* v. *Smith* (1) and the discussion at page 87 of the meaning of the terms "harsh and unconscionable." It is pointed out that in *In re A*

(1) [1906] 1 K. B. 79.

Debtor (1) the M. R. and Cozens Hardy L. J. each say that under the section of the Money Lenders Act, which deals with harsh and unconscionable bargains, the interest charged might be so excessive as of itself to render the bargain harsh and unconscionable. This does not mean that if only it is shown that a high rate of interest has been charged by a money-lender a Judge has complete power at his discretion to make a new contract for the parties. But it may mean that a very high rate of interest might raise a presumption that that rate had been extorted by conduct harsh and unconscionable, or it may mean that the same circumstances which showed that the rate was excessive might and often would show that the transaction was harsh and unconscionable. At the end of the judgment of Cozens Hardy L. J., he expressly says that the Court must have regard to all the circumstances of the case, and this, says Channell J., is the proposition upon which the whole matter turns.

Now, under the amended section 16 of the Contract Act this question of a harsh and unconscionable bargain can only be considered in reference to undue influence—where there is ample security an excessive rate of interest has been held to be anything over ten per cent., where there is no security no rate of interest can be considered excessive. There can be no standard rate on personal loans, and where the parties are reasonably on terms of equality a Judge cannot do better than adopt what they themselves have agreed on, though of course when that is not the case he has to adjudge what is reasonable as best he can under all the circumstances.

Applying these principles to section 16 and to the case before us, we think that a presumption of undue influence could arise from the fact that a security of

(1) [1903] 1 K. B. 705.

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over Rs. 3,000 with a mortgage already on it for a much smaller amount was given for a loan of Rs. 80, and although on the findings of fact of the lower Courts such a presumption would in no way help defendant No. 1 nor possibly his brother defendant No. 2, who is his co-sharer in property No. 5, it certainly applies in full force to defendant No. 3, against whom there is finding that he knew what he was doing and who gave the greater part of the security without any idea that 60 per cent. compound interest would be running against him for six years. We must take it from the terms of the bond that the intention of the parties was to pay Rs. 5 a month interest for a few months until the small principal of Rs. 80 was paid off. And we cannot believe that no attempt was made by defendant No. 3 to pay this money, and there is no finding whatever against him in either of the judgments.

Further, the contract being for a temporary accommodation, the stipulation that interest was to run at Rs. 5 a month was one which necessitated the payment of interest not at 60 per cent. per annum but at Rs. 5 in each month, and a stipulation that in default of 12 months' instalments of interest, compound interest would begin to run at 60 per cent. is in the nature of a penalty.

However technical this may be, we think it is the duty of the Courts in India to enforce the letter of the law against obviously harsh and unconscionable bargains of this nature. The contract failing therefore as regards defendant No. 3 and being a joint mortgage, it equally fails against the other defendants.

Our view upon both these points has recently been propounded by the Madras High Court. In the case of *Muthu Krishna Iyer* v. *Sankaralingam Pillai* (1),

(1) (1912) I. L. R. 36 Mad. 229.

the question of penalty was dealt with and the remarks of Sadasiva Iyer J. in making the reference to the Full Bench have our entire concurrence. If we may respectfully say so, it is a masterly exposition of the intentions of the Legislature in India and a complete answer to the somewhat timid reluctance of the Courts in the earlier decisions to take a more extended view of their powers under section 74 of the Contract Act. We entirely agree that "the exploitation of the necessitous, of the careless and inexperienced is a trade to be extirpated in the interest of the whole community as contrary to individual morality as well as to public policy."

At the risk of repetition, we cite the words of Lord Loreburn L. C. in *Samuel* v. *Newbold* (1). "In my opinion this contention cannot be maintained, nor ought a Court of Law to be alert in placing a restricted construction upon the language of a remedial Act. The section means exactly what it says, namely, that if there is evidence which satisfies the Court that the transaction is harsh and unconscionable, using those words in a plain and not in any way technical sense, the Court may re-open it, provided, of course, that the case meets the other condition required. These are only illustrations, and, as in the case of fraud, it is neither practicable nor expedient to attempt any exhaustive definition. What the Court has to do in such circumstances is, if satisfied that the interest or charges are excessive, to see whether in truth and fact and according to its sense of justice the transaction was harsh and unconscionable. We are asked to say that an excessive rate of interest could not be of itself evidence that it was so. I do not accept that view. Excess of interest or charges may of itself be such evidence, and particularly if it be unexplained. If no

(1) [1906] A. C. 461.

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justification be established, the presumption hardens into a certainty."

Now, in the case before us, no explanation whatever is offered of the harsh and unconscionable interest charged in a case where the fullest security covering the loan forty times over was given, and no explanation is given why the money-lender whom the defendants apparently trusted handed them over to another shark who was able to ruin them entirely. It was the opinion of the Full Bench that the amendments in the Indian Law of Contract went further in the direction of relief against harsh and unconscionable bargains than those of the English Money Lenders Act, and that therefore the *dicta* of English Judges under that Act might be accepted; and Sadasiva Ayar J. summed up the judgment of the Full Bench by saying: "I do not intend to go further than I have done in my reference order into all the English and Indian cases in which learned Judges have, by the use of refined subtle language and the examination of variously worded tests and principles, tried to persuade themselves that they were acting on any other principles in giving relief against *primâ facie* unconsionable bargains except the one intelligible principle that the provision relieved against was unconscionable in the view of ordinary men of the world possessing the usual quantum of common sense."

Having found that there is technically a penalty in the bond before us, we propose to go behind the contract as to interest and to refuse compound interest altogether.

But we would go further in reference to section 16, which was dealt with in the case of *Kesavulu Naidu* v. *Arithulai Ammal* (1).

(1) (1912) I. L. R. 36 Mad. 533.

The learned Chief Justice points out that the Judge in the Court of Appeal below found against fraud as in this case and does not find that there was undue influence, but he assumes for the purposes of the appeal before him, as we must assume in this appeal, that it is open to the High Court to deal with the case as if there had been a plea of undue influence raised. In the end, the learned Judges held that the presumption arising from the unconscionable nature of the bargain for 60 per cent. interest had been rebutted and gave the plaintiff a decree; but the principle that such a presumption would arise was upheld, and on the facts found in this case we cannot say that it has been rebutted.

The parties were not at arm's length. The defendants needed the money on the spot—their own moneylender took advantage of them and made them over to a confederate, who by representing that the loan was a temporary one at 5 per cent. per mensem, was enabled to pile up 60 per cent. compound interest by not asking for payment. Had it been open to us to go into the facts, we should probably have been able to find that only Rs. 88 was due having been tendered, but we are precluded from doing this in second appeal. We can only find that having regard to the very large security given, to the ignorance and want of knowledge of defendant No. 3, and to the conduct of the parties, even if defendant No. 1 has no defence, it must certainly be held that defendant No. 3 did not enter into a valid contract to pay 60 per cent. compound interest. The contract being one and indivisible, we must go behind it as a whole and give reasonable interest, which we fix at 30 per cent. simple interest as that was what defendants themselves were prepared to admit. This will work out at Rs 80 principal, and interest for 7 years 6 days Rs. 168-6-5.

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There will, therefore, be a mortgage decree for Rs. 248-6-5 with costs to the plaintiff in proportion to his success. The defendants Nos. 1 and 2 will get no costs on the amount disallowed. The defendant No. 3 will get costs on the sum disallowed, in proportion to the amount of his security.

S. K. B.

CRIMINAL REVISION.

Before Jenkins C.J., and Teunon J.

1914

Sept. 9

SAROJBASHINI DEBI

v.

SRIPATI CHARAN CHOWDHRY.*

Public Nuisance—Encroachment on public pathway—Application to District Magistrate by letter—Reference of applicant by letter to Civil Court—Subsequent petition to the Subdivisional Magistrate regarding the same pathway—Issue of conditional order—Appearance of opposite party and claim of title to the path—Dropping proceedings without taking evidence— Criminal Procedure Code (Act V of 1898), ss. 133, 137.

When a Magistrate makes a conditional order under s. 133 of the Criminal Procedure Code against a party who appears and shows cause, he is bound, under s. 137, to take evidence as in a summons case. It is open to him thereafter to consider whether there is a complete answer to the case, or whether it is not a proper one for reference to the Civil Court.

ON the 29th November 1911, one Ram Lal Chowdhry and others wrote to the District Magistrate of the 24-Parganas alleging that Sripati Charan Chowdhry and others, opposite party, had encroached upon a public pathway, and praying for the removal of the encroachment. A reminder was sent to the Magistrate on the

*Criminal Revision No. 1154 of 1914, against the order of H. P. Duval, Sessions Judge of 24-Perganas, dated June 4, 1914.

13th May 1912, whereupon he had the matter enquired into by various persons *ex parte* and informed the applicants by letter, dated the 23rd May, "that, as the matter involves civil disputes, they should seek their remedy in the proper Court." On the 23rd December 1913, the petitioners made an application under s. 133 of the Criminal Procedure Code to the Subdivisional Magistrate of Basirhat who directed the police to enquire and report. Upon the receipt of the report the Magistrate drew up a proceeding under s. 133 on 13th January 1914 directing the opposite party to remove the obstruction within 15 days, or to appear and show cause. The latter appeared on the 11th February, and showed cause, alleging, *inter alia*, that the path was not a public one and that the present proceedings were without jurisdiction with reference to the previous decision of the District Magistrate. The Subdivisional Officer then directed the parties to produce evidence on the 3rd March, but dropped the proceeding on the 28th April, without taking any evidence, on the ground that the order of the District Magistrate amounted to a judgment, and that, as long as it remained in force, he himself had no jurisdiction to entertain the present proceeding. The petitioners, after an infructuous application to the Sessions Judge of the 24-Parganas moved the High Court and obtained the present Rule.

Babu Dasarathi Sanyal and *Babu Debendra Narain Bhattacharjee*, for the petitioners.

Babu Atulya Charan Bose and *Babu Dwijendra Nath Mukerjee*, for the opposite party.

JENKINS C. J. The proceedings which are called in question by the Rule now under consideration arise out of action taken by the Magistrate under Chapter X of the Code of Criminal Procedure. Section 133

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provides that whenever a Magistrate, of the qualifications there described, considers, on receiving a police report or other information and on taking such evidence, if any, as he thinks fit, that any unlawful obstruction should be removed from any way used by the public, he may make a conditional order of the nature described in the section, and may call upon the person affected to appear before himself and move to have the order set aside or modified. Here it appeared to the Magistrate that there was a public nuisance coming within the terms of that section and the nature of the nuisance was an unlawful obstruction of a way used by the public. He accordingly made a conditional order. The person affected undoubtedly appeared and showed cause, but notwithstanding that the Magistrate has allowed the proceedings to drop, without following the procedure prescribed by section 137, clause (*1*). It is this omission on the part of the Magistrate that has led to the Rule being granted calling upon the opposite party to show cause why the order complained of should not be set aside and such other and further order made as to this Court might seem fit.

We have been assured that a large number of cases appear to sanction what the Magistrate has done, though they do not go the length that he has. But whatever may have been decided, we cannot escape from the words of the Legislature until we are told by some higher authority that we must. The Legislature in the event that has happened has directed that the Magistrate shall take evidence in the matter as in a summons case, and in so far as he has failed to do that he has not performed the duty cast upon him by law. It appears to me that the rule is rightly conceived. It is said that it is open to the Magistrate to consider whether the claim by the opposite party

in derogation of this asserted public right affords an answer or not. But in deciding that section 137 must be followed. We in no way deprive the opposite party of his right to show that the terms of section 133 do not apply, or say that the Court should not apply them, in the particular circumstances of the case, either by reason of real doubt as to the applicability of the section or otherwise. All we say is that the Magistrate having taken such measures as make the provisions of section 137 applicable, those provisions must be observed.

Therefore, we must make the Rule absolute and direct the case to go back to the Magistrate in order that he shall take evidence in the matter as in a summons case in the manner provided by section 137. It will be open to him, as I have indicated, to consider, when that evidence is taken, whether there is a complete answer to the case against the opposite party or whether this is not a case where the parties should be referred to the Civil Court for the purpose of determining a matter which for some reason or other the Magistrate considers that he cannot decide. But in saying that I do not wish to encourage the idea that the Magistrate should endeavour to escape from dealing with matters which legitimately fall within his jurisdiction.

There is one further matter that has been pressed upon us. It is that these proceedings are in some measure barred by the doctrine of *res judicata*. We are not satisfied that there is any room on the facts of this case for the application of this doctrine.

TEUNON J. I agree.

E. H. M. *Rule absolute.*

CRIMINAL REVISION.

Before Jenkins C.J., and Teunon J.

1914

Sept. 9.

AKBAR ALI MAHOMED

v.

EMPEROR.*

Surety—Rejection of sureties only on police report without judicial enquiry into their fitness—Inquiry to be held by the Magistrate passing the order for security—Criminal Procedure Code (Act V of 1898), ss. 118, 122.

Sureties tendered by a party bound down under s. 118 of the Criminal Procedure Code should not be rejected on a police report as to their fitness, but only after a judicial enquiry under s. 122, and by the Magistrate who has passed the order for security.

ON two reports submitted by the Sub-Inspectors of Boda and Panchnagara in the district of Jalpaiguri, respectively, proceedings under s. 110 of the Criminal Procedure Code were initiated against the petitioner before Babu Uma Prasanna Guha, a local Deputy Magistrate. After holding an enquiry, the Magistrate directed the petitioner, by his order dated 15th April 1914, to execute a bond for good behaviour for one year in the sum of Rs. 200 with two sureties each in the like amount, and in default to undergo rigorous imprisonment for the same period.

An appeal against the said order was dismissed on the 2nd June 1914 by Mr. D. H. Lees, Deputy Commissioner of Jalpaiguri. The petitioner thereafter produced two sureties, Mahabatulla Muhamad Prodhan and Ahmed Ali, and the question of their fitness was referred to the police for inquiry. On receipt of

* Criminal Revision No. 1247 of 1914, against the order of C. W. Jacob, Deputy Commissioner of Jalpaiguri, dated July 6, 1914.

the police report, Mr. C. W. Jacob, the Deputy Commissioner, rejected the sureties on the 6th July 1914.

The petitioner thereupon moved the High Court and obtained the present Rule.

Mr. P. N. Dutt and *Babu Nakuleshwar Mookerjee*, for the petitioners.

No one appeared for the Crown.

JENKINS C.J. AND TEUNON J. In this case the accused petitioner had been required to furnish security for good behaviour under section 118, read with section 110 of the Criminal Procedure Code. Thereupon he offered two sureties, and the matter was referred by the Magistrate to the police for enquiry. The police submitted a report to the effect that the sureties were not acceptable; and, proceeding upon that report, the Magistrate refused to accept the sureties. It has been repeatedly pointed out that sureties offered should not be refused except after judicial enquiry by the Magistrate who has made the order under section 118, such enquiry to be made under the provisions of section 122 of the Criminal Procedure Code. This Rule was, therefore, granted calling upon the Deputy Commissioner to show cause why the petitioner should not be given an opportunity of showing that the sureties offered were fit to be accepted. No cause has been shown and on the facts we have stated we make this Rule absolute, and direct that the Magistrate do now hold an enquiry in accordance with law, and upon the enquiry decide whether the sureties offered are or are not fit persons.

Pending this further enquiry the sureties offered will be provisionally accepted.

E. H. M. *Rule absolute.*

CRIMINAL REVISION.

Before Jenkins C.J., and Teunon J.

1914

Oct 13.

MAHAJAN SHEIKH

v.

EMPEROR.*

Warrant, validity of—Warrant, signed but not sealed,—Arrest under such warrant—Rescue and escape from lawful custody—Criminal Procedure Code (Act V of 1898), s. 75 (1)—Penal Code (Act XLV of 1860), s. 225 B.

Under s. 75 of the Criminal Procedure Code, the affixing of the seal of the Court is essential to the validty of a warrant. An arrest under a warrant duly signed but not sealed is, therefore, illegal : and a conviction under s. 225B of the Penal Code is bad in law.

THE facts of the case are as follows. During the hearing of the case of *Kafiluddi* v. *Madar Sheik* in respect of an offence under s. 342 of the Penal Code, in the Court of the Sub-Deputy Magistrate of Satkhira, the defence cited certain witnesses, including Ibrahim Ahmed and Gopal, and summonses were issued on them. On the 30th April 1914, the date fixed for the hearing, the witnesses failed to appear, whereupon the trying Magistrate ordered the issue of warrants against them with bail. The warrants were duly signed by him but did not bear the seal of the Court. On the 9th May two constables took the warrants to the village where the witnesses resided and arrested Ibrahim and Ahmed. Madar, who was present, stated that he had not applied for the warrants and fetched the petitioner Mahajan to read them. As bail was not

* Criminal Revision No. 1414 of 1914, against the order of H. A. Street, Sessions Judge of Khulna, dated July 22, 1914

furnished, the police officers were about to take the arrested persons to the thana, when Mahajan pushed one of them aside, and the prisoners escaped.

Mahajan and Ibrahim were placed on trial before Babu A. G. Roy, Deputy Magistrate of Satkhira. They denied the whole occurrence and contended that the warrant had been illegally endorsed and executed. They were, however, convicted on the 30th June, under s. 225B. of the Penal Code, and sentenced to three months' rigorous imprisonment each.

An appeal was filed against the order before the Sessions Judge of Khulna and objection taken that the warrant, not having been sealed, was invalid. The learned Judge held that s. 537 covered the defect and dismissed the appeal. The petitioners then moved the High Court and obtained the present Rule.

Babu Manmatha Nath Mukerjee, for the petitioners, contended that, as s. 75 of the Code of Criminal Procedure required the warrant to be sealed, the arrest was illegal and the conviction bad.

JENKINS C.J. AND TEUNON J. Under section 75 of the Code of Criminal Procedure the seal of the Court is essential to the validity of a warrant. The absence of a seal in this case made the warrant void and there, consequently, was no legal arrest. We, therefore, make the Rule absolute. If the petitioners are on bail, the bail will be discharged; if in custody, they will be released.

E. H. M. *Rule absolute.*

PRIVY COUNCIL.

P.C.*

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June, 23, 24; *Oct.* 21.

SECRETARY OF STATE FOR INDIA

v.

KIRTIBAS BHUPATI HARICHANDAN MAHAPATRA,

(AND ANOTHER APPEAL CONSOLIDATED).

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Chaukidari Chakran Lands—Village Chaukidari Act (Beng. VI of 1870) ss. 1, 48, 49, 50, 51, 52, 58—Power of resumption and assessment of chaukidari chakran lands—Zamindari estates in Orissa—Regulation XII of 1805, s. 33—Regulation XIII of 1805, s. 41—Regulation I of 1793, s. 8, cl. (4)—Onus of proof.

In these appeals, the Judicial Committee (affirming the decision of the High Court) *held*, on a consideration of the history of Orissa, and of the legislation applicable to its settlement, and the nature of its zamindari estates, that the Government were, under the circumstances, not entitled to resume and assess with revenue, as being chaukidari chakran lands within the meaning of the Village Chaukidari Act (Bengal Act VI of 1870) certain lands forming part of the estates of the respondents (the zamindars of Sukinda and Madhupur) in Orissa, with whose ancestors settlements had been made in 1803, and sanads granted by which statutory confirmation was given by section 33 of Bengal Regulation XII of 1805, and in respect of which estates the revenue was settled in perpetuity.

The history of chaukidari grants as set out in the judgment of Lord Kingsdown in the case of *Joykishen Mookerjee* v. *Collector of East Burdwan* (1) referred to.

The respondents in discharge of the duties imposed on them by their sanads to maintain peace and order within their estates (the manner in which they were to carry out such duties being impliedly left by the Government to the zamindars, as there was no machinery provided for the purpose in the legislation previous to 1870) retained in their service a large

* *Present*: LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, SIR JOHN EDGE AND MR. AMEER ALI.

(1) (1864) 10 Moo. I. A. 16.

number of chaukidars whom, according to the custom of the country, they remunerated by grants of land in lieu of wages. A register of these chaukidars was kept in the zamindari office, and in the appointment of the chaukidars, in more than one instance, the Government Police Officer had a voice. But the records showed that the zamindars often changed the lands held by these men, and resumed what they considered to be in excess of their requirements. Bengal Act VI of 1870 was extended to Orissa in 1879. In suits by the respondents against the Secretary of State for a declaration that the Act did not apply to the lands in question :—

Held, that the onus was on the appellants to show that when the zamindaries were confirmed to the respondents' ancestors, such confirmation was subject to reservations in respect of any land which gave the Government the power of resuming and assessing it, and that onus had not been discharged.

The power of resumption was reserved by Government in the old Regulations in respect of lands which had been set apart by the zamindar with their permission or under their authority. In Regulation I of 1793 the word used is "appropriated"; in Regulation XIII of 1805 the expression "assigned" is employed : but in both statutes the characteristics of the grants under which the lands were held depended on the implied authorisation of the Government, which excluded them from consideration in the adjustment of the jama of the mahal. In the present cases the appellant had failed to show that any parcel of land was not taken into account in fixing the rent respectively payable by the respondents, nor that there was any obligation on the part of the respondents to make such grants. The only obligation on them was to maintain peace and order within their zamindaries. They entertained the services of chaukidars for whose maintenance they allotted from time to time certain lands of their own free will. The mere fact that some appointments were made with the approval of a Government official could not alter the nature of the grants.

The word "assigned" in the definition section of Bengal Act VI of 1870 means land assigned by Government, or appropriated under their authority or with their permission. Not only did the form of the "transferring order" in Schedule C of the Act clearly show that the expression "assigned" is applied to lands assigned by Government for the maintenance of the chaukidars, and in respect of which they reserved the right to resume and transfer to the zamindar subject to an additional assessment, but the resolution by which the Act was extended to Orissa leaves no possibility of doubt what the Government understood the Act to mean. In the orders passed a distinction is made with regard to chaukidari holdings in the temporarily-settled tracts and those situated in "permanently-settled estates." With regard to these it is declared that on

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resumption "the holdings should be included in the estates within which they lie, and form part of its assets in the future." Nothing can be clearer that the Act was designed to deal with lands which, although lying within a mahal, did not form part of its assets, which was not the case with the respondents' zamindaries.

Two consolidated appeals (90 and 91 of 1913) from two judgments and decrees (23rd March 1910) of the High Court at Calcutta, which reversed the judgments and decrees (27th May 1907 and 11th September 1906, respectively) of the Court of the Subordinate Judge of Cuttack, in two separate suits.

The defendant was the appellant to His Majesty in Council.

The principal question for determination in these appeals was as to whether the lands in dispute were chaukidari chakran lands within the meaning of the Village Chaukidari Act (Bengal Act VI of 1870), and were as such validly assessed with revenue by the Collector and transferred by him to the respondents under section 48 of that Act.

In appeal 90 the respondent was the zamindar of Killa Sukinda, a large estate in the portion of Orissa known as the Moghulbandi, a cultivated tract which had been conquered by the Moghuls in 1580. Up to 1803 Midnapur was the only district of Orissa under British rule. The other portion was under the Mahratta rule until October 1803, when the whole of the province now known as Orissa, came under the British occupation and Government; and on behalf of the East India Company, Colonel Harcourt and Mr. Melville, a Civil Officer, were appointed Commissioners to settle the affairs of the province. In pursuance of this settlement *kaulnamas* (engagements in the nature of treaties) were, on 22nd November 1803, entered into by the Commissioners with certain Khandaits or Feudatory Rajas, the holders of

the largest and most important estates in Orissa, thus rendering them of semi-independent status.

In the suit which gave rise to appeal 90 of 1913, the zamindar of Sukinda based some of his claims and contentions on the allegation that he held under a *kaulnama* and therefore had the status of one of these Feudatory Rajas. Both the Courts in India, however, found that that allegation was not proved.

In appeal 91 the respondent was the zamindar of Madhupur and his estate was also situate in the Moghulbandi in Orissa. He claimed to hold not under a *kaulnama*, but under a sanad which he alleged had been lost.

Both the estates of Sukinda and Madhupur were held by the respondents under settlements from the British Government at a fixed *jama* in perpetuity, and were subject to the same legislation as any other permanently-settled estate in British India. They were both in the district of Cuttack, and by section 13 of Regulation XIII of 1805 it was provided that "all laws and regulations for the maintenance of the police and for the administration of justice in criminal cases in the Province of Bengal, which had been or shall be enacted, and which shall not be inconsistent with or repugnant to the provisions of this Regulation . . . . shall have full force and effect in the Zilla of Cuttack.

Bengal Act VI of 1870 (the Village Chaukidari Act) was passed to provide (*inter alia*), for the appointment, dismissal, and maintenance of village chaukidars, and applied at first only to Bengal; but was by a notification of 25th May 1899, extended by the Lieutenant Governor of Bengal, under section 68 of the Act, to the district of Cuttack.

The duties of the village chaukidar, or watchman (who is one of the ancient institutions of the country),

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were to keep watch and to act in aid of the police, and they performed such duties under the directions and supervision of the District Superintendent of Police and the Magistrate of the district to whose authority they were subject. These chaukidars, of whom there were a large number throughout the estates of Sukinda and Madhupur, held, according to immemorial rule and custom, grants of land out of the estates as jagirs in remuneration for their services.

After the extension of Bengal Act VI of 1870 to Cuttack and the consequent appointment of chaukidars who were maintained and remunerated by the Government, the estates were no longer liable for the performance of the chaukidari duties, but became subject to assessment under the Act, and the imposition of a tax in chaukidari chakran lands: and the Collector under the orders of Government proceeded to ascertain the chaukidari chakran lands held as jagirs in Sukinda and Madhupur respectively, in order to deal with them under Bengal Act VI of 1870. Lists of the chaukidari chakran lands held as jagirs by chaukidars in those estates having been furnished to the Collector on 7th April 1902 by the respondent in appeal 90, and on 8th August 1901 by the manager under the Court of Wards of the estate of the respondent in appeal 91, the Collector made orders under the Act transferring the chaukidari chakran lands in Sukinda and Madhupur to the respective respondents in these appeals, and assessed the contributions payable to the Chaukidari Fund in respect of such jagir lands so transferred at Rs. 119-3-2½ and Rs. 410-11-6 respectively.

The respondents took possession of the said lands, and after making various objections, paid under protest the amounts assessed on the lands.

The suits out of which these appeals arose were instituted on 9th May 1906 in respect of appeal 90,

and on the 9th April 1904 in respect of appeal 91. The cases of the plaintiffs as stated in their plaints were (*inter alia*) that the orders of the Collector were illegal inasmuch as the lands in suit were not chaukidari chakran within the meaning of Bengal Act VI of 1870; that they could not be the subject of a transfer or an assessment of revenue under section 48 of that Act; that the orders were in violation of the terms of the grants to them of their estates; and that no commission had been appointed in accordance with section 58 of the Act. The plaintiffs therefore sought a declaration that the lands so transferred by the Collector were not chaukidari chakran lands; that the Collector had no power to transfer or assess them; and that all proceedings taken by him for those purposes were illegal; and prayed for an injunction restraining him from interfering with the plaintiffs' lands.

The main defences set up were that the lands in suit were chaukidari chakran within the meaning of Bengal Act VI of 1870, that the orders of the Collector for transfer and assessment were valid, that no commission under section 58 of the Act was required, and that the suits were barred by limitation under article 14 of Schedule II of the Limitation Act, 1877.

The suits were heard by different Subordinate Judges, and the Court in each case held that the lands in question were chaukidari chakran within the meaning of Bengal Act VI of 1870, that the Collector's orders were valid and binding, and that there was no necessity for any commission under section 58 of the Act. Decrees were accordingly made dismissing the suits with costs.

A Divisional Bench of the High Court (WOODROFFE and CASPERSZ JJ.) held in each case that the lands in suit were not chaukidari chakran within Bengal Act VI of 1870 because it had not been shown by the

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appellants that the lands had been granted and assigned by the Government to chaukidars at the time of the permanent settlement of their estates, or that they had been excluded from assessment at such permanent settlement; and that consequently the Collector had no jurisdiction to make the orders of transfer and assessment. The High Court also held that the suits were not barred by limitation.

The decisions of the Courts below were accordingly reversed, and decrees were passed in favour of the plaintiff in each suit.

On this appeal,

Sir H. Erle Richards, *K. C.*, and *A. M. Dunne*, for the appellant, contended that the lands in suit were chaukidari chakran lands within the meaning of the Village Chaukidari Act (Bengal Act VI of 1870), and therefore the orders made by the Collector of Cuttack under sections 1 and 48 of that Act were valid and binding on the respondents. Previous litigation, it was submitted, should not be referred to for the purpose of construing Bengal Act VI of 1870 on the Act. On the proper interpretation of the Act, the presumption was that lands such as those in suit came within the definition of chaukidari chakran lands, and that under section 48 they had been rightly transferred to the respondents and assessed with revenue. The word "assigned" in that section meant assigned by the Government, and not on a temporary settlement. The onus was on the respondents to show that they were not chaukidari chakran lands. Reference was made to the preamble of the Act, and Sections 1, 3, 37, 41, 45, 48, 49; Bengal VIII of 1793, section 41; Bengal Regulations XII of 1805, section 33, and XIII of 1805; and Bengal Regulation XX of 1817, section 21. The respondents, it was submitted, had failed to establish the facts they alleged as showing that the

right of the Government to resume the lands in suit was restricted, or did not apply to the lands as being chaukidari chakran. There was no necessity for the appointment of any commission under section 58 of the Act. The Subordinate Judge rightly held that the lands were chaukidari lands.

De Gruyther, *K.C.*, and *B. Dubé*, for the respondents, contended that the onus of proving that the lands in dispute were chaukidari chakran lands within the meaning of Bengal Act VI of 1870 lay upon the appellant, and he had failed to discharge it. The Bengal Regulations referred to, and Bengal Act VI of 1870 were not, on their true construction, applicable to the lands in suit. The orders of the Collector were therefore made without jurisdiction and were void and not binding on the respondents. The Permanent Settlement did not cover the whole of Bengal; there were parts of it which had to be settled afterwards; and there were two sets of persons called chaukidars, one performing public, and the other private duties. Reference was made to Bengal Regulation I of 1793, section 8, clause (*4*); *Leelanund Singh* v. *Government of Bengal* (1); Toynbee's Sketch of the History of Orissa from 1803 to 1828 (Ed. 1873); Bengal Act VI of 1870, sections 56, 57; Harington's Analysis, Vol. II, pages 235, 236; Resolution from the Chief Secretary to the Government of Bengal, Judicial Department, dated 9th February 1897, paragraph 3; and Bengal Regulation XII of 1805, section 33. The decision of the High Court as to the nature of the lands in suit, was, it was submitted, correct, and they could not be transferred nor subjected to assessment under the provisions of Bengal Act VI of 1870.

Sir H. Erle Richards, *K.C.*, in reply, referred to Bengal Act IX of 1880 which, he contended, recognised

(1) (1855) 6 Moo. I. A. 101, 107, 109, 132.

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such assessments as had been made. The decision of the High Court placed too great a restriction on the power of the Government to resume and assess these lands. The case of *Leelanund Singh* v. *Government of Bengal* (1) did not deal with chaukidari assessments. To support the respondents' contentions something required to be read into the provisions of Bengal Act VI of 1870, which was unnecessary on the construction put on it by the appellant. The appeal should be allowed.

The judgment of their Lordships was delivered by

Oct. 21.

MR. AMEER ALI. The plaintiffs in the two actions which have given rise to the present appeals are respectively the zamindars of Sukinda and Madhupur in the Province of Orissa, and the question for determination relates to certain lands included in their estates in respect of which the defendant, the Secretary of State for India in Council, claims to exercise the right of resumption and assessment by virtue of the provisions of Act VI of 1870 of the Bengal Council.

The facts of the two cases are set out with great clearness in the judgments of the High Court of Bengal, and do not, therefore, require a detailed statement. Their Lordships propose to give only a brief sketch of the circumstances which have culminated in the present litigation.

It appears that the predecessors of the two plaintiffs had been in possession of their estates from a time long anterior to the establishment of British power in that part of the country. The origin of their title under British rule is intimately connected with the political history of the province. Orissa consists

(1) (1855) 6 Moo. I. A. 101.

of three well-defined tracts; in the middle lies a level open country inhabited by a settled population. Here the Moguls in the reign of Akbar introduced their revenue system with its regular assessment of public dues. These territories were consequently designated the *Mogulbandi*, which is defined in Regulation XII of 1805 as "being that part of the District of the Zillah of Cuttack in which, according to established usage, as in Bengal, the land itself is responsible for the payment of the public revenue, and in which every landholder holds his land subject to the conditions of that usage."

The wild and hilly tract on the west, and the low marshy lands along the sea-shore to the east were held by a number of chiefs who, under the designation of *rajas*, *zamindars*, and *khandaits*, were allowed to exercise a feudal sway in their respective *jagirs* on payment of a fixed tribute to the Imperial Government. These outlying parts of the Province were usually called the *Rajwara*.

The zamindaris of Sukinda and Madhupur lay within the *Rajwara* and outside the *Mogulbandi* territories.

Shortly before the acquisition of the Dewanny by the East India Company, the Mahrattas had obtained possession of a large tract to the south of the Suvarnarekha river, including the *Rajwara*, and thus, when the Company obtained the virtual government of Bengal, Bihar and Orissa, under Shah Allam's grant, the *de facto* British possession of the latter province did not extend beyond the Suvarnarekha to the south of Midnapore.

In 1803, the Mahratta Raghoji Bhonslay, who held southern Orissa, came into collision with the forces of the East India Company, and in the October of that year the country south of the Suvarnarekha

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river was occupied by British forces. The settlement of the newly-acquired territories was entrusted to Colonel Harcourt, who commanded the Company's troops, and a civil officer of the name of Mr. Melville. They were designated Commissioners, and they appear to have done their work with great thoroughness. In this settlement were included the zamindars of Sukinda and Madhupur, to whom sanads were granted entitling them to hold their estates at a fixed *jama* in perpetuity. These two *zamindaris* were then brought within the *Mogulbandi* and subjected to the general regulations in force in Bengal.

Later in the year came the Treaty of Deogaun, by which Bhonslay ceded a considerable tract of country belonging to the hill chiefs. With these, agreements or *kaulnamas* were entered into guaranteeing the perpetual enjoyment by them of their properties on definite terms. The zamindar of Sukinda alleged in his suit that he also held under a *kaulnama*, but he failed to establish his allegation, which was evidently made under some misapprehension.

There is no doubt, however, that a settlement was made with, and a *sanad* granted to, him by the Commissioners, the terms of which will be referred to in the course of this judgment.

By Section 33 of Regulation XII of 1805 statutory confirmation was given to the *sanads* of the two plaintiffs' ancestors.

The lands in dispute admittedly form part of the estates settled with the plaintiffs' ancestors in 1803 and in respect of which the revenue was fixed in perpetuity. The plaintiffs accordingly urge that the Collector representing the defendant has no right to exercise in respect of these lands the powers he claims under Bengal Act VI of 1870. The basis of his contentions will appear clearly when the course of

legislation which led up to this enactment has been shortly explained.

From time immemorial it has been customary in India to remunerate officers charged with certain public or quasi-public duties by grants of lands to be held either rent-free or at a reduced rent.

One of the best known examples of these service-tenures is the grant of lands in lieu of wages to individuals who were charged with the performance of police duties in rural areas, and is commonly known as *chowkidari chakran* lands, from the word *chowkidar* which means "a watchman" and *chakran* "service."

The history of these *chowkidari* grants is set out with considerable lucidity in Lord Kingsdown's judgment in the case of *Joy Kishen Mookerjee* v. *The Collector of East Burdwan*(1). The following passage explains the origin of the system and the shape it assumed after the Decennial Settlement of 1789 and the Permanent Settlement of 1793.

"It appears that these *zamindars* were entrusted, previously to the British possession of India, as well with the defence of the territory against foreign enemies as with the administration of law and the maintenance of peace and order within their district; that for this purpose they were accustomed to employ not only armed retainers to guard against hostile inroads, but also a large force of *Tannahdars*, or a general Police force, and other officers in great numbers, under the name of *chowkeedars*, *pykes* and other descriptions, as well for the maintenance of order in particular villages and districts as for the protection of the property of the *zamindar*, the collection of his revenue and other services personal to the *zamindar*.

"All these different officers were at that time the servants of the *zamindar*, appointed by him and removeable by him, and they were remunerated in many cases by the enjoyment of land rent-free or at a low rent in consideration of their services.

"The lands so enjoyed were called *chakran* or service lands. These lands were of great extent in Bengal at the time of the Decennial

(1) (1864) 10 Moo. I. A. 16.

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Settlement, and the effect of that Settlement was to divide them into two classes :—

"First. *Tannahdary* lands, which, by Ben. Reg. I of 1793, sec. 8, cl. 4, were made resumable by the Government ; the Government taking upon itself the maintenance of the general Police force and relieving the *zamindar* from that expense.

"Second. All other *chakeran* lands, which by Ben. Reg. VIII of 1793, sec. 41, were, whether held by public officers or private servants, in lieu of wages, to be annexed to the *malguzary* lands and declared responsible for the public revenue assessed on the *zamindars'* independent *talooks* or other estates, in which they were included in common with all other *malguzary* lands therein."

Later on, Lord Kingsdown explains the nature of the lands that were held by *chowkidars* in lieu of wages. Paraphrasing clause 4, section 8 of Regulation I of 1793, and section 41 of Regulation VIII of 1793, he says :—

"They were not to be included in the *malguzary* lands for the purpose of increasing the *jumma* because the *zamindars* had not the full benefit of them, but they were to be included in the *malguzary* lands for the purpose of securing the assessment, because in the event of a sale upon default of payment of the assessment, it would be important that they should be transferred to the purchasers under the Government, with whom the appointment of the person whose duty would in part be to attend to public interests would vest."

It is clear from the language of clause 4, section 8 of Regulation I of 1793, and of section 41 of Regulalation VIII of the same year, that the power or "option" of resumption was reserved in respect of those lands that had been appropriated by the zamindar with the permission or under the authority of Government for the purpose of remunerating the *chowkidars* for their services, lands which, although included in the mahal and "annexed" to the *malguzari* lands, were not taken into consideration for the assessment of revenue because in reality they formed no part of his assets.

Here it becomes necessary to notice the *sanad* that was granted to the zamindar of Sukinda in 1804,

an attested copy of which is in the record. A *sanad* was also granted to the zamindar of Madhupur; it apparently has been lost, but it may be assumed that it was to the same effect as the zamindar of Sukinda's *sanad*, the attested copy of which is, so far as is material, as follows:—

"As the duties of the zamindar of the said Killa have from before been entrusted to Dhrubjoy Bhupati Harichandan, the zamindar, the zamindari of the said Killa has been bestowed upon and given to the said zamindar by the Government of the East India Company; you shall regard the said person as the permanent zamindar of the said Killa, and shall not act against his orders, instructions, and advice, and shall not conceal and keep secret any matter whatsoever from him. The said zamindar shall discharge the duties attached to the said zamindari in proper manner, and collect rent from the said zamindari in the best way according to the laws of the Government, and he shall without any objection pay into the Government Treasury 5,500 kahan cowris, the fixed annual amount payable to the Government, in proper time and according to proper instalments. He shall keep the tenants and the people in general satisfied and pleased by good treatment, and shall make such exertions and attempts as to make the zamindari improve and prosper, and he shall be so careful and vigilant that swords, guns, and other war weapons and ammunition may not be manufactured in the said zamindari, and that theft, robberies at night, and highway robberies may not be committed at any place; and in case such occurrence takes place, he shall arrest the thieves with stolen property and send them up to the Huzur (Government officers) for trial."

It will be observed that the *sanad* imposes on the zamindar the duty of preventing the commission of theft, robberies at night, and highway robberies, "and in case of any such occurrence," of arresting the offenders and "sending them for trial." But it makes no provision regarding the machinery he was to employ for the purpose. The evident inference is that the Government was content with leaving to the zamindar the manner in which he was to discharge the duty of maintaining peace and order in his *zamindari*. The Government obviously made no provision therefor. Regulation XIII of 1805, which was enacted "for the maintenance of the peace and for the

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support and administration of the police in the zillah of Cuttack," did not, as appears to be clear from the preamble and from the provisions of Section 5, relate to the *zamindaris* of Sukinda and Madhupur, the settlement of which, as already stated, had been made by special *sanads*.

The subsequent enactments, before the Act of 1870 passed with the object of regularising or improving the rural police, are not material to this judgment. It is sufficient to say that the system under which the village *chowkidars* as a part of the police machinery, held parcels of land as remuneration for their services, wherever in vogue, remained practically untouched until 1870. It was then that the necessity was felt of bringing the rural police or village *chowkidars* under the direct control of the State.

The preamble to the Act states the object with which it was enacted.

Section 1 defines *chowkidari chakran lands*. It says :—

"The words 'chowkeedaree chakran lands' shall mean lands which may have been assigned, otherwise than under a temporary settlement, for the maintenance of the officer who may have been bound to keep watch in any village and report crime to the police, and in respect to which such officer may be at the time of the passing of this Act liable to render service to a zemindar."

The Act then lays down rules for the constitution of village *punchayets* or committees whose powers and duties are defined in considerable detail. In Part II, it proceeds to deal with the *chowkidari chakran lands*.

Sections 48, 49 and 50 form the most material provisions of the Statute for the purposes of the present discussion.

They run as follows :—

"48. All chowkeedaree chakran lands before the passing of this Act assigned for the benefit of any village in which a punchayet shall be

appointed, shall be transferred in manner and subject as herein-after mentioned to the zemindar of the estate or tenure within which may be situate such lands.

" 49. All lands so transferred shall be subject to an assessment which shall be fixed at one-half of the annual value of such land according to the average rates of letting, land similar in quality in the neighbourhood of such land, and such assessment shall be made by the punchayet of the village.

"50. Such assessment when made by the punchayet shall be submitted to the Collector of the district, and he or any other officer exercising the powers of a Collector by him thereunto appointed may approve or revise and approve the same (provided that it shall be lawful for the zemindar to contest the assessment before it is so approved), and after such approval the Collector of the district shall, by an order under his hand in the form in Schedule (C), transfer to such zemindar such land subject to the assessment so approved."

Section 51 declares that the order of transfer made under section 50 shall operate to transfer the land to such zamindar subject to the assessment and subject to the rights of third parties.

Section 52 declares that the amount of the assessment shall be a permanent charge on the land ; and the subsequent sections provide how it is to be realized in case of default of payment.

Section 58 empowers the Lieutenant-Governor to appoint commissions " to ascertain and determine "—

" the chowkeedaree chakran lands and other lands before the passing of this Act assigned for the maintenance of an officer to keep watch in any village and to report crime to the police in such district."

But for the contentions, to which their Lordships will advert later, that have been advanced on behalf of the appellant, the Secretary of State for India, it would not have been necessary to give in extenso the above sections.

Bengal Act VI of 1870 was, when enacted, not introduced into Orissa ; its operation was confined to Bengal where the category of lands referred to in Lord Kingsdown's judgment largely existed.

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In 1899, the Act was, by a resolution of the Government of Bengal, dated the 9th of February 1897, extended to Orissa.

It appears that the plaintiffs, the zamindars of Sukinda and Madhupur respectively, in discharge of the duties imposed on them by their *sanads* to maintain peace and order within their estates, retained in their service a large number of *chowkidars* whom, according to the custom of the country, in lieu of wages they remunerated by grants of land. A register of these *chowkidars* was kept in the zamindari office, and it would appear that in the appointment of the *chowkidars* in more than one instance the Government police-officer had a voice. But the records show that the zamindar often changed the lands held by these men, and resumed what he considered to be in excess of their requirements.

Such was the condition of affairs in these two *zamindaris* when the Act was made applicable to Orissa.

Shortly after its extension, the Collector of the Cuttack District proceeded to apply its provisions to the lands held by the *chowkidars* of Sukinda and Madhupur respectively, on the ground that they were *chowkidari chakran lands* within the meaning of the Act. The plaintiffs protested strongly against his proceedings: whilst expressing their willingness to submit to any reasonable contribution that might be required of them for the payment of the *chowkidars* who were to be appointed under the new system, they took exceptions to the Collector's attempts to resume and assess or re-assess their lands, and to transfer the same to them. Their objections were rejected, and the lands were then attached and put up to sale under the provisions of ss. 54 and 55 of the Act.

The plaintiffs thereupon brought these actions in

the Court of the Subordinate Judge of Cuttack, in substance, for a declaration that the Act did not apply to the lands in suit, and for an injunction restraining the defendant appellant from interfering with them.

The two suits were tried by two different Subordinate Judges, who affirming the contention of the Collector that the lands in dispute were *chowkidari chakran lands*, dismissed the actions. On appeal, the High Court of Bengal, after an exhaustive examination of the subject, reversed the decisions of the first Court and granted the plaintiffs the relief they sought.

The Secretary of State for India in Council has appealed in both actions; and it has been contended on his behalf that the learned Judges of the High Court were in error in referring to the previous legislation in order to construe Bengal Act VI of 1870; that the Act was applicable to all lands whether "assigned" by Government or by the zamindar for the maintenance of *chowkidars*; and that the onus was on the plaintiffs to show that they were not *chowkidari chakran lands*.

Their Lordships think that this argument proceeds on a manifest fallacy. The lands in dispute admittedly lie within the ambit of the estates settled with the plaintiffs' ancestors.

The respondents are the zamindars and "as such they have the *primâ facie* title," to use the language of this Board in the well-known case of *Rajah Sahib Perhlad Sein* (1), to the full enjoyment of every parcel of land within their zamindaris for which they pay revenue to Government.

It rests on the defendant to show that when the zamindaris were confirmed to the plaintiffs' ancestors

(1) (1869) 12 Moo. I. A. 292, 331.

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it was subject to reservations in respect of any land which gave Government the power of resuming and assessing it. That onus the defendant has not discharged; in fact it is not now contended for him that there was any such reservation. The power of resumption was, as already remarked, reserved by Government by the old Regulations in respect of lands which had been set apart by the zamindars with its permission or under its authority.

In Regulation I of 1793 the word used is "appropriated"; in Regulation XIII of 1805, the expression "assigned" is employed; but in both statutes the characteristics of the grants under which the lands were held depend on the implied authorisation of the Government which excluded them from consideration in the adjustment of the *jama* of the Mahal. In the present case the defendant has failed to show that any parcel of land was not taken into account in fixing the rent respectively payable by the plaintiffs, nor that there was any obligation on the part of the plaintiffs to make such grants. The only obligation on them was to maintain peace and order within their zamindaris. They entertained the services of *chowkidars* for whose maintenance they allotted from time to time certain lands of their own free will. The mere fact that some appointments were made with the approval of a Government officer cannot alter the nature of the grants.

In their Lordships' opinion the word "assigned" in the definition section of Bengal Act VI of 1870 means lands "assigned" by Government or appropriated under its authority or with its permission. Not only does the form of the "Transferring Order" in Schedule C of the Act clearly show that the expression "assigned" is applied to lands "assigned" by Government, as explained above, for the maintenance

of the *chowkidars* and in respect of which they reserved the right to resume and transfer to the zamindar subject to an additional assessment; but the resolution by which the Act was extended to Orissa leaves no possibility for doubt what the Government understood the Act to mean. Their Lordships do not propose to burden their judgment with long quotations from this interesting document; they only wish to refer to two passages which appear to them to place the matter beyond doubt. In one place the Lieutenant-Governor after reviewing the whole subject says:—

"As already remarked, the Chowkidari Jagirs are State grants. They are excluded in the temporarily-settled estates from the settlements made with the zamindars, while in the permanently settled estates they cannot be legally interfered with by the zamindars. The latter have thus in both classes of estates no connection with the Jagir lands, and the Lieutenant-Governor accepts the view that they are under no obligation to furnish lands or otherwise specially provide for the maintenance of the Chowkidars. Their liability is to contribute to any funds raised in the same manner as other residents of the villages. Nor is it binding on the Government to continue the Jagir grants for all time."

In the orders that are passed, a distinction is made with regard to the *chowkidari* holdings in the temporarily settled tracts, and those situated in "permanently-settled estates."

With regard to these it is declared that on resumption "the holdings should be included in the estates within which they lie, and form part of its assets in the future."

Nothing can be clearer in their Lordships' view that the Act was designed to deal with lands which, although lying within a Mahal, did not form a part of its assets, which is not the case with the zamindaris of Sukinda and Madhupur.

Their Lordships are of opinion that the judgments and decrees of the High Court should be affirmed and

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these appeals dismissed with costs. And they will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitor for the appellant: *The Solicitor, India Office.*

Solicitors for the respondents: *Barrow, Rogers, & Nevill.*

J. V. W.

SPECIAL BENCH.

Before Jenkins C.J., Woodroffe and Holmwood JJ.

1915

Jan. 11.

In re ABUL KALAM AZAD.*

Forfeiture—Press Act (I of 1910), s. 4 (1)—Order made by Local Government of Delhi—Jurisdiction—Delhi Laws Act (XIII of 1912).

Where an order was made under section 4 (*1*) of the Indian Press Act, 1910, by the Local Government of Delhi, directing the forfeiture wherever found of all copies of a newspaper published on a certain date in Delhi, on an application to set aside the order made by a person who had in his possession in Calcutta a particular copy :—

Held, that this High Court had no jurisdiction to entertain the application.

APPLICATION.

This was an application under sections 17 and 19 of the Indian Press Act, 1910, by Abul Kalam Azad, described as of Calcutta, to set aside an order of forfeiture made under the Act.

It was alleged by the petitioner that he "was the editor of a weekly newspaper known as *Al-Hilal* and was the recipient of a copy of the newspaper called *The Comrade* (bearing date the 26th September 1914)

* Original Jurisdiction.

in exchange for his newspaper *Al-Hilal* and as such became the owner of that newspaper and held possession thereof."

By a notification dated the 2nd November 1914, the Governor-General in Council *quâ* the Local Government of the Province of Delhi declared the security of Rs. 2,000 deposited in respect of "The Comrade and the Hamdard Press, Kucha-i-Chalan, Delhi," and all copies of the issue of the newspaper called *The Comrade* bearing date the 26th of September 1914, wherever found to be forfeited to His Majesty.

The notification was in these terms:—

"NOTICE.

In pursuance of Section 4 (1) *of the Indian Press Act, 1910.*

To

The Keeper of "The Comrade and The Hamdard Press, Kucha-i-Chalan, Delhi."

WHEREAS, in exercise of the power conferred by section 3 of the Delhi Laws Act, 1912 (XIII of 1912) the Governor-General in Council has been pleased to declare by Notification No. 1008, dated the 1st of October, 1912, that the powers or duties conferred or imposed on the Local Government under the Indian Press Act, 1910 (I of 1910), shall be exercised or performed by the Governor-General in Council, and not by the Chief Commissioner of Delhi, and

Whereas, it appears to the Governor-General in Council that the printing press known as "The Comrade and the Hamdard Press, Kucha-i-Chalan, Delhi" in respect of which security to the amount of Rs. 2,000 has been deposited in accordance with the provisions of section 3 (*1*) of the Indian Press Act, 1910, has been used for printing and publishing the issue of the newspaper called *The Comrade* bearing date the 26th of September, 1914, and

Whereas, the said issue of the said newspaper contains an article entitled 'The Choice of the Turks" printed at pages 233 to 243 of the said issue, the whole tenour of which article, and in particular the words indicated and described in the schedule annexed to this notice, is in the opinion of the Governor-General in Council likely or has a tendency, directly or indirectly, whether by inference or suggestion or otherwise, to excite disaffection towards His Majesty and the Government established by law in British India.

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Now, therefore, take notice that the Governor-General in Council in pursuance of section 4 (1) of the Press Act, 1910, declares the security of Rs. 2,000 deposited in respect of *The Comrade* and the Hamdard Press, Kucha-i-Chalan, Delhi," and all copies of the issue of the newspaper called the "The Comrade" bearing date the 26th of September, 1914, wherever found to be forfeited to His Majesty.

By order of the Governor-General in Council,

(Sd.) H. WHEELER,

Secretary to the Government of India."

HOME DEPARTMENT,
(Political);
Delhi, *2nd November, 1914.*"

It was alleged by the petitioner that the article in *The Comrade*, to which exception had been taken, was a rejoinder to an article entitled "The Choice of the Turks" which appeared in *The Times* on the 29th August 1914, and it was submitted that the article did not come under the purview of section 4, sub-section 1 of the Act.

The application was heard by a Special Bench appointed under the Indian Press Act, 1910.

The Advocate-General (*Mr. G. H. B. Kenrick*, K. C.) stated that he appeared in support of the order of forfeiture, under instructions from the Government of Bengal on whom notice of the application had been served. He took the preliminary objection that this Court had no jurisdiction to entertain the application inasmuch as no order of forfeiture had been passed by the Government of Bengal, and the applicant had no interest in the subject matter of the forfeiture.

[He was stopped.]

Mr. B. Chakravarti, for the petitioner. In framing the Press Act, 1910, the Legislature has studiously avoided investing the Government of India with any powers thereunder. The Legislature obviously intended to authorise the Local Government within

whose territory the Press was, to pass the order of forfeiture; this order under section 4, sub-section (*1*) would affect all copies wherever found. The object would be to avoid the possibility of conflict between the orders of the several Local Governments. Where the Legislature intended to limit the application of a section within local limits, appropriate words were used: see section 3 (*2*) and section 8 (*2*). An order of forfeiture by any Local Government would operate over the whole area covered by the Press Act. It follows that the order of the 2nd November 1914 directing the forfeiture of all copies *wherever found* affects the particular copy in the possession of the petitioner in Calcutta. Although the copy has not actually been forfeited, the petitioner's proprietary right in it has been affected: that being so, the petitioner is entitled to apply to this Court for relief. The petitioner does not complain against any particular Local Government, but against an order which affects property belonging to him, and which property is within the jurisdiction of this Court. It is submitted this Court has jurisdiction to entertain this application.

The Advocate-General was not called on to reply.

JENKINS C.J. Without in any way assenting to the proposition that Abul Kalam Azad is a person having an interest in any property in respect of which the order of forfeiture has been made and so entitled to come before any High Court under section 17 of the Indian Press Act of 1910, it appears to me that there is another and absolutely fatal objection to this application. It appears, though the petition is not in order on this point, that on the 2nd November 1914 the Governor-General in Council in pursuance of section 4 (*1*) of the Press Act, 1910, declared the

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security of Rs. 2,000 deposited in respect of "The Comrade and the Hamdard Press Kuchai-Chalan, Delhi" and all copies of the issue of the newspaper called the *The Comrade* bearing the date the 26th of September, 1914, wherever found to be forfeited to His Majesty, and this order was served on the person concerned, presumably the Keeper of the Printing Press on the 3rd of November 1914. The Governor-General in Council in so acting was exercising a power conferred under the Delhi Laws Act of 1912, so that for the purposes of this application we must treat the order as though made by a Local Government under the Indian Press Act. The complaint of the petitioner is that 'he as a recipient of a copy of *The Comrade* in exchange for his newspaper *Al Hilal* became the owner of that *newspaper.*' I suppose he means of a *copy of the newspaper* and that he held possession thereof. He appears to consider that the order of forfeiture affects him in Bengal. But whether it does or does not—a point on which I express no opinion—it was made by the local authority I have described, and not by the Government of Bengal. There has been no order made by the Government of Bengal and no action by it or by any of its officers of which the petitioner can complain. According to the scheme of the Indian Press Act and its several provisions, it is abundantly clear that we have no jurisdiction in this case. Moreover, our rules only provide for a notice being served on the Government of Bengal. We are however asked to interfere with an order made by an authority exercising at Delhi the powers of a Local Gonernment, without having that authority before us, and without having any means of compelling its attendance.

It is not as though the petitioner has no remedy. There is a High Court to which he could have gone,

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and therefore it cannot be said that justice is denied him by our holding, as we do, that we have no jurisdiction to interfere in this case.

The application is, therefore, dismissed.

WOODROFFE J. I agree.

HOLMWOOD J. I agree.

Application refused.

Attorneys for the petitioner: *B. N. Basu & Co.*

J. C.

APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C.J., and Woodroffe J.

SUKHLAL CHUNDERMULL

v.

EASTERN BANK, Ld.*

1915

Jan. 18.

Appeal—Letters Patent, 1865, s. 15—"Judgment"—Order by single Judge on Original Side directing defendant to give security—Civil Procedure Code (Act V of 1908), O. XXXVII, r. 2.

An order made by a single Judge sitting on the Original Side, under O. XXXVII, rule 2 of the Code of Civil Procedure, directing a defendant to give security as a term on which leave to defend should be given, is not a "judgment" within the meaning of s. 15 of the Letters Patent and is not appealable.

Justices of the Peace for Calcutta v. *Oriental Gas Company* (1) followed.

Sonbai v. *Ahmedbhai Habibhai* (2) referred to.

* Appeal from Original Civil, No. 5 of 1915, in Original Suit No. 1271 of 1914.

(1) (1872) 8 B. L. R. 433. (2) (1872) 9 Bom. H. C. 398.

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SUKHLAL CHUNDERMULL v. EASTERN BANK, LD.

APPEAL by Sukhlal Chundermull, the defendant, against the order of CHITTY J.

On the 30th November 1914 the Eastern Bank, Ld., an English Company having a branch office in Calcutta instituted this suit under Order XXXVII of the Civil Procedure Code, against the defendant carrying on business in Calcutta, claiming the sum of Rs. 1,53,898-12-2 for principal and interest and notarial expenses alleged to be due on twenty several bills of exchange.

It was alleged in the plaint that one of these bills of exchange, No. 586, was drawn on C. J. Hambro & Sons, London, and the other nineteen bills were drawn on W. F. Malcolm & Co., London. All the bills were drawn by the defendant in Calcutta, and were payable to his order and were endorsed by him in Calcutta to the plaintiff Bank for valuable consideration. Bill No. 586 reached London on the 4th August 1914 and was presented for acceptance by the London office of the plaintiff Bank on the 7th August 1914, the 4th, 5th and 6th being Bank holidays : the bill was retained by the drawees and dishonoured on the 20th August 1914. The remaining bills reached London on the 14th August 1914 and were on the same day presented for acceptance by the London office of the plaintiff Bank : the bills were retained by the drawees and dishonoured on the 18th August 1914. The twenty bills were duly protested for non-acceptance, and the defendant was duly notified of the bills being dishonoured and protested.

On the 4th January 1915, the defendant made an application to Chitty J. for an order that he may be at liberty to appear and defend the suit, on the ground that he had a good defence to the suit. In his petition the defendant admitted that the bills of exchange were drawn by him and discounted by him with the plaintiff Bank. It was alleged that "the bills were

sold to the plaintiff Bank along with shipping documents and invoices made out in accordance with contracts for sale entered into by the defendant. The shipping documents related to goods on board the S.S. *Westmark*, *Trieste* and *Moravia* which are enemy vessels and which as your petitioner is informed and believes have taken refuge in neutral ports . . . . and it was the duty of the purchasers to accept the bills and take delivery of the shipping documents." It was further contended in the petition that if the persons to whom the goods were sold availed themselves of the delay in presentation of the bills and tender of the shipping documents (by the plaintiff Bank) to refuse acceptance and reject the tender the plaintiff Bank was solely responsible, that if acceptance was refused owing to a *moratorium* in force in London the plaintiff Bank was not entitled to make any claim on the defendant without having presented the bills on the expiration of such *moratorium*, and that in any event the plaintiff Bank was entiled to claim from the defendant only any deficiency after realizing the amounts payable by the purchasers of the goods or the valuer of the goods. The defendant disputed the claim for interest and finally alleged that he was a person of substance and the application was not made for the purpose of delay.

On the 4th January 1915, Chitty J. passed the order "that upon the defendant within a fortnight from the date hereof giving security to the satisfaction of the Registrar of this Court to the extent of the plaintiff Bank's claim in this suit, he be at liberty to appear in and defend this suit."

The order was filed on the 12th January. Against this order, the present appeal was preferred by the defendant Sukhlal Chundermull on the 13th January. The main ground of appeal was that the learned Judge

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should have granted the defendant leave to defend unconditionally, and should not have required the defendant to furnish security.

Mr. Zorab, for the appellant. The order of Chitty J. directing the defendant to furnish security is a "judgment" within the meaning of section 15 of the Letters Patent and is appealable: *R.* v. *R.* (1), *Vyasachary* v. *Keshavacharya* (2), *Seshagiri Row* v. *Nawab Askur Jung Aftab Dowla* (3), *Veerabadran Chetty* v. *Nataraja Desikar* (4), *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (5). The learned Judge was in error in directing security to be furnished; the defendant should have been allowed unconditional leave to defend: *Jacobs* v. *Booth's Distillery Company* (6).

Mr. Avetoom, for the respondent Bank, was not called upon.

JENKINS C.J. According to a course of decisions in this Court, the order complained of is not a "judgment" from which an appeal lies under the Letters Patent. Reference has been made to a number of Madras authorities which are entitled to every respect, but which we can not follow in preference to the course of decisions in this Court. It has always been recognised that the Madras High Court has taken a somewhat broader view of clause 15 of the Charter than has prevailed here. The decisions of this Court rest upon what was said by Sir Richard Couch in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (5). In this case there is not even an appeal allowed under the Code, so that it cannot be

(1) (1890) I. L. R. 14 Mad. 88.
(2) (1901) I. L. R. 25 Mad. 654.
(3) (1902) I. L. R. 26 Mad. 502.
(4) (1904) I. L. R. 28 Mad. 28.
(5) (1872) 8 B. L. R. 433.
(6) (1901) 85 L. T. 262.

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suggested, if the order made had been in a mofussil Court. that an appeal would have lain under Order XLI. But that perhaps is not so material here, as it would be in Bombay where it would possibly have been regarded as decisive of the question against the appellant: *Sonbai* v. *Ahmedbhai Habibhai* (1).

We must, therefore, dismiss this application with costs.

WOODROFFE J. I agree.

Appeal dismissed.

Attorneys for the appellants: *Watkins & Co.*

Attorneys for the respondents: *Orr, Dignam & Co.*

J. C.

(1) (1872) 9 Bom. H. C. 398.

PRIVY COUNCIL.

BALMUKUND

v.

KING-EMPEROR.

*P.C.** 1915

March 3.

[ON APPEAL FROM THE CHIEF COURT OF THE PANJAB AT LAHORE.]

Privy Council, Practice of—Special leave to appeal in Criminal case, application for—Petitioners sentenced to death—Stay of execution of sentences pending hearing of petition, refusal of—Tendering advice as to exercise of King's Prerogative of pardon.

On an application for special leave to appeal in a case in which the petitioners had been sentenced to death, their Lordships of the Judicial Committee, not being a Court of Criminal Appeal, declined to interfere with regard to staying execution of the sentences pending the hearing,

* *Present:* THE LORD CHANCELLOR (LORD HALDANE), LORD DUNEDIN, LORD ATKINSON, SIR GEORGE FARWELL AND MR. AMEER ALI.

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or to express any opinion as to whether they ought to be suspended. The tendering of advice to His Majesty as to the exercise of His Prerogative of pardon is a matter for the Executive Government, and is outside their Lordships' province.

PETITION for special leave to appeal from an order (17th February 1915) of the Chief Court of the Panjab confirming an order (6th October 1914) of conviction and sentence of death passed by the Special Sessions Judge of Delhi.

The petitioners were arrested at Delhi in connection with what was known as the Delhi Conspiracy case arising out of the occurrence of a bomb outrage at Lahore by which a man was killed. The charge against the accused, four of whom were the petitioners, was under sections 120 B and 302 of the Penal Code, being conspiracy to murder, and committing certain offences under the Explosive Substances Act (VI of 1908). The Magistrate at Delhi committed the accused for trial which took place before the Special Sessions Judge (Mr. Harrison) with three native assessors, with the result that three of the four petitioners were sentenced to death, and the fourth to transportation for life, the rest of the accused being acquitted.

On appeal to the Chief Court of the Panjab, the convictions were affirmed, and all four of the petitioners were sentenced to death.

The petition stated that the executions were to be carried out a few days after the date of the present application.

Sir R. Finlay, K. C., and *B. Dube*, for the petitioners, said that the petition for special leave to appeal could not be proceeded with until the transcript of the evidence and the judgment of the Chief Court were received from India, and asked that the

hearing of the petition should stand over, and that by order of the Board, or by advice tendered by the Board to the Government of India, execution of the sentences should be stayed pending the hearing of the petition for special leave to appeal. It was very desirable that they should not be carried out before the arrival of the necessary documents in England, and the hearing of arguments on the petition.

A. M. Dunne, for the Crown.

The judgment of their Lordships was delivered by

March 3.

THE LORD CHANCELLOR. Their Lordships are unable to advise His Majesty to make any order on the petition for special leave to appeal at this stage.*

With regard to staying execution of the sentence of death, their Lordships are unable to interfere. As they have often said, this Board is not a Court of Criminal Appeal. The tendering of advice to His Majesty as to the exercise of His Prerogative of pardon is a matter for the Executive Government, and is outside their Lordships' province. It is, of course, open to the petitioners' advisers to notify the Government of India that an appeal to this Board is pending. The Government of India will no doubt give due weight to the fact, and consider the circumstances. But their Lordships do not think it right to express any opinion as to whether the sentence ought to be suspended.

Solicitors for the petitioner: *Barrow, Rogers & Nevill.*
Solicitor for the Crown: *Solicitor, India Office.*

J. V. W.

* The petition was eventually dismissed on the 28th April 1915. *Rep. Note.*

CIVIL REFERENCE.

Before Sharfuddin and Coxe JJ.

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March 15.

RAM SARUP BHAGAT

v.

BANSI MANDAR.*

Bond—Slavery bond—Public policy—Overwhelming interest.

Where in a bond the executant bound himself down to daily attendance and manual labour until a certain sum was repaid in a certain month, and it penalised default with overwhelming interest :—

Held, that such a bond was not enforceable at law being opposed to public policy.

THIS was a reference by the Munsif of Banka, whether a certain bond was enforceable at law. It arose out of a suit to recover money on a *harwahi* (ploughman's) bond. The defendant, on the 26th of Falgun 1315, borrowed Rs. 13 from the plaintiff and gave him a bond in the following terms:—

"I am Bansi Mander, son of Aghauri Mander deceased, by caste a Koeri, inhabitant of Golampur, Perganah Bhagalpur.

I have borrowed Rs. 13 in cash from Ram Sarup Bhagat inhabitant of Bandara to meet my household expenditure. In satisfaction of interest, I shall daily remain in attendance, and plough the land of the said Bhagat, work with spade in his land, transplant his seedlings, thresh his crops by means of *danni*, etc., and shall perform and manage all works required from me. I shall take wages and *butad* (food) according to the usage of the said village. In the year . . . I wish to repay the money, I shall repay it in the month of Baisakh of that year in one lump sum, and then I will leave his work. I shall not repay money in any other month except the month of Baisakh. If I absent myself from work without repaying the money, then I shall pay interest at the rate of Rs. 6-4 per. cent. per mensem from the date of absence to the day of realization. I have, therefore, executed this

* Civil Reference, No. 3 of 1915, by Kamala Prasad, Munsif of Banka, dated Jan 22, 1915.

harwahi (ploughman's) bond on the above conditions so that it may be of use, when required."

The plaintiff's case was that the defendant had left his service without paying the debt. Hence the suit for the recovery of Rs. 13 as principal, and Rs. 22 interest, in all Rs. 35. The defendant did not appear to contest the suit.

The learned Munsif in his letter of reference observed as follows:—

"Bonds of this nature are very common in this Subdivision and I am told that there is no agriculturist who has not taken such a bond from his labourers. It is very difficult for agricultural operations in this Subdivision to go on smoothly without such bonds. But it is said that such bonds are really slavery bonds, and reference to such bonds was made in a recent administration report of the Government of Bihar and Orissa. If these bonds are really slavery bonds, they should be declared null and void by the Courts. But in my opinion these are not slavery bonds. The contract though for indefinite period is determinable by the labourer on payment of money secured by the bond. The labourer is, moreover, to get his customary wages from the employer so long as he serves him. No doubt the provision to pay exorbitant rate of interest is such as to deter the labourer from leaving the service. The abject and poor condition of majority of these labourers are such that they are never able to pay the money secured, unless there is another employer who pays him a higher value out of which he may redeem himself. Under such a circumstance, the stipulation to pay an exorbitant rate of interest often serves as a check on him and prevents him from leaving the service. The result is that the same family of labourers goes on serving the same family of employer from generation to generation. But this is a circumstance which is not the result of the contract itself, but of extraneous circumstances. The provision to pay interest is really a penal provision which may be relieved against by Court.

As I entertain reasonable doubt on the point of law involved in this case, I refer under Order XLVI, r. 1, of the Civil Procedure Code for the decision of the Hon'ble High Court the following question :—

Whether the bond in suit is a slavery bond ? Are its terms enforceable ?"

SHARFUDDIN AND COXE JJ. This is a reference by the Munsif of Banka, under Order XLVI, rule I of the

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Civil Procedure Code, for a decision whether a certain bond is enforceable at law. It appears to us that it is not so enforceable. It binds down the executant to daily attendance and manual labour until a certain sum is repaid in a certain month and penalises default with overwhelming interest. It is remarkable that the suit, which is brought on this bond, is not contested, and this, in the Munsif's opinion, is probably due to the fact that the executor is too poor to defend himself. Such a condition is indistinguishable from slavery, and such a contract is, in our opinion, opposed to public policy and not enforceable.

S. K. B.

APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

ABDUL GANI CHOWDHURY

v.

MAKBUL ALI.*

1914

July 28.

Occupancy Holding—Revenue Sale Law (Act XI of 1859), s. 37—Occupancy raiyats at fixed rates—Purchaser—Doctrine of Protection—Its extension.

The protection of occupancy raiyats at fixed rates, referred to in s. 37 of the Revenue Sale Law (Act XI of 1859) is not one of the ordinary exceptions in that section. It is a proviso expressing the determination of the Legislature that no purchaser shall disturb any of the permanent tenants on the land who are in actual occupation of the soil and are cultivating it.

This doctrine of protection has recently been extended to ordinary occupancy raiyats.

Sarat Chandra Roy v. *Asiman Bibi* (1) referred to.

Bhut Nath Naskar v. *Surendra Nath Dutt* (2) distinguished.

SECOND APPEAL by Abdul Gani Chowdhury, the plaintiff.

This appeal arises out of a suit brought by the plaintiff for recovery of about 4 kanis of land in the defendant's possession and for declaration of the said land as a holding which can be annulled under s. 37 of the Revenue Sale Law. It was alleged in the plaint that the land in question was sold for arrears of revenue and was purchased by the defendant No. 5 who obtained sale certificate and took possession according to law; that thereafter defendant No. 5 sold the entire land to the plaintiff; that defendants Nos. 1

* Appeal from Appellate Decree, No. 636 of 1912, against the decree of Rajani Kanta Chatterjee, Subordinate Judge of Chittagong, dated Jan. 11, 1912, reversing the decree of Rasik Mohan Bhattacharjee, Munsif of Chittagong, dated July 10, 1911.

(1) (1904) I. L. R. 31 Calc. 725. (2) (1909) 13 C. W. N. 1025.

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to 4 were in possession of the same and that they, though they had no protected rights to the same, yet refused to make over possession to the plaintiff.

Before the Munsif, only defendants Nos. 1 and 2 appeared and contested the suit. The contesting defendant set up ancestral right to the lands under a *pottah*, dated 1st Bhadra 1257. The Munsif held that the right of the defendants was not protected under s. 37 of the Revenue Sale Law and therefore decreed the suit against the defendants. On appeal, the Court below found that the defendants were holding the lands for over 30 years and had permanent raiyati right by virtue of a *pottah*, dated 1257 M.E. and decreed the appeal with costs.

Babu Prabodh Kumar Dass (*with him Babu Khitish Chandra Chuckerbutty*), for the appellant, submitted that the Subordinate Judge had erred in law. Raiyats holding at fixed rents or permanent lease-holders do not become occupancy raiyats after the lapse of 12 years. The distinction has been clearly explained by Mookerjee J. in the case of *Bhut Nath Naskar* v. *Surendra Nath Dutt* (1). The rights of a permanent lessee created by virtue of a *maurusi mokarrari* lease are often held to be of the nature of a permanent tenure-holder. The protection to persons, contemplated by the proviso to s. 37 of the Revenue Sale Law, has been extended to ordinary occupancy raiyats. Mr. Justice Mitter's judgment in *Sarat Chandra Roy* v. *Asiman Bibi* (2) is an authority for that proposition. But that judgment does not go so far as to protect *maurusi mokarrari* raiyati holding at fixed rates.

The distinction between occupancy raiyats at fixed rents and raiyats holding at fixed rates is that while

(1) (1909) 13 C. W. N. 1025. (2) (1904) I. L. R. 31 Calc. 725.

one may be created by the proprietor by grant of leases to that effect, the other is a creature of law, pure and simple, with certain disabilities and controlled by certain defined rules.

Moreover, if the judgment of the Subordinate Judge is upheld, great difficulties may arise in the way of the proper realisation of Government revenue.

The preamble of Act XI of 1859 shows that the purchaser of an estate at a sale should be placed in the same position as the original proprietor at the time of the settlement.

No one appeared for the respondents.

HOLMWOOD AND CHAPMAN, JJ. This second appeal arises out of a suit brought by the plaintiff to have the holding of the defendant declared such a holding as can be annulled under section 37 of Act XI of 1859.

It appears that the plaintiff is the purchaser of the rights of defendant No. 5 who purchased the *taraf* at a sale for arrears of revenue. The defendants Nos. 1 and 2 are persons whom the Judge found to have cultivated the land themselves for 30 years before 1895 when they obtained *pottah* as raiyats at fixed rates. That *pottah* of course conferred upon them higher privileges than that of ordinary occupancy raiyats, but it certainly did not take away the occupancy right which they had already acquired, for they must have acquired that right prior to the Bengal Tenancy Act, not that in our opinion it would make any difference. The protection of occupancy raiyats at fixed rates which is referred to in section 37 of Act XI of 1859 is not one of the ordinary exceptions in that section. It is a proviso expressing the determination of the Legislature that no purchaser shall disturb any of the permanent tenants on the land who are in actual occupation

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of the soil and are cultivating it. The term "rights of occupancy at fixed rent" meant in the year 1859 apparently the successors of *khademi khud khast* raiyats in the Regulations, while the ordinary *khud khast* raiyats became occupancy raiyats. The intention of the Legislature therefore was that these *khademi khud khast* raiyats should not only not be liable to ejectment but should not be liable to any enhancement of rent; and to these persons have succeeded what the Bengal Tenancy Act now classes as "raiyats holding at fixed rates." Raiyats holding at fixed rates therefore are primarily the persons referred to in the proviso to section 37 of Act XI of 1859. But this doctrine of protection has been extended by recent rulings of this Court to ordinary occupancy raiyats, and the judgment of Mr. Justice Mitra, which is the leading case [*Sarat Chandra Roy Chowdhry* v. *Asiman Bibi*(1)] on this point, is frequently followed in this Court and has never been dissented from. The protection therefore is extended under the Bengal Tenancy Act from these *khademi khud khast* raiyats or raiyats at fixed rates to all classes of occupancy raiyats; and the decision of Mr. Justice Mookerjee, upon which the Chief Justice did not express any opinion, in the case of *Bhut Nath Naskar* v. *Surendra Nath Dutt*(2), which is based upon a technical interpretation of section 160 of the Bengal Tenancy Act, can have nothing whatever to do with the question before us.

It may be argued that a person who takes the tenancy originally as a raiyat at fixed rates does not thereby acquire an occupancy right. But that does not imply that a man who has already obtained occupancy rights can by obtaining a grant of fixed rent lose that occupancy right. That appears to us to be neither

(1) (1904) I. L. R. 31 Calc. 725. (2) (1909) 13 C. W. N. 1025.

in accordance with equity or common sense or the wording of the law.

We must therefore hold that the defendants were precisely in the position of those tenants who are mentioned in the proviso to section 37 and that not only are they protected but nothing in the law can be construed to entitle the purchaser to eject them or to enhance their rent. That is the law, and to argue that the purchaser loses a valuable right, namely, the right of enhancement which he would have in the case of ordinary occupancy rights, is to misconstrue the whole effect of the section itself, which is in terms directed against enhancement. If the ruling of Mr. Justice Mitra is correct, an occupancy raiyat in the ordinary sense of the word is also protected by that section and it is doubtful whether in that case the purchaser can enhance his rent, although the Bengal Tenancy Act itself provides for the enhancement of the rent of an ordinary occupancy raiyat. However, this is not the question which we have to deal with here.

Another question which was argued was with regard to the Judge's view of the *khatian* of 1898 in which the defendants are recorded as *kaimi madhya satyadhikari*, or intermediate tenure-holders, at fixed rent. It was faintly urged that the presumption arising from this record could not be rebutted by evidence of what happened before the record was made. It appears to us that the findings of the Judge as to what happened before the record was made prove conclusively that the record was wrong; for these men had been cultivating this land with their own hands for 30 years when they obtained the *pottah* describing them as *kaimi* raiyats. The area of the land was only 4 kanis and odd and there was no indication whatever that this holding was a tenure. It can only be a tenure if it is proved that it was demised

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for the purpose of settling cultivators upon it and for collecting rent, and not for the purpose of being cultivated by the raiyat or his family and servants. The facts of the case which extend up to 1895 and are not altered in any way by the *pottah* of that date except in respect of giving the defendants fixed rent conclusively prove that at the time of the settlement they could not have been tenure-holders within the meaning of section 5 (*1*), Chapter III of the Bengal Tenancy Act.

The third contention was that we ought to have the *pottah* before us to construe it. As the defendants have not chosen to appear in answer to this appeal, it is suggested that we ought to give the appellant further time to get this *pottah* produced. We have always understood that when a decree has been passed against a person who desires to appeal, it is for him to put forward all necessary materials for the purpose of getting the presumption which is against him on the lower Court's judgment set aside. He could easily have made a prayer in the petition of appeal that the defendants be called upon to produce this pottah or that the lower Court be directed to obtain it and forward it to this Court. We cannot either wait for it now or construe it. The finding, however, of the learned Judge and the arguments of the learned vakil indicate quite sufficiently what were its contents and the arguments which are based upon it with which we have already dealt.

As regards the plaintiff's prayer for assessment of fair and equitable rent, we cannot see how that can arise in a suit under section 37 of Act XI of 1859 since the very basis of the protection offered by that section is against any enhancement, and enhancement is really what the plaintiff is seeking for. It is not within the scope of the suit; if it were, fair and equitable rent of

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an occupancy raiyat at fixed rates would obviously be the rent which had been fixed for his holding.

The result is that the appeal is dismissed, but without costs, as the respondents do not appear.

S. K. B. *Appeal dismissed.*

APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

1914

July 29.

AMINNESSA

v.

JINNAT ALI.*

Under-raiyati Holding—Transferability—Transfer of Property Act (IV of 1882), s. 117—Agricultural lands—Relinquishment or abandonment, what constitutes.

An under-raiyati holding is not transferable. What is relinquishment or abandonment depends on the substantial effect of what has been done in each case. When a tenure or holding, apart from the Transfer of Property Act, is not transferable, it cannot become so unless it is expressly made so by some other statute.

If it had been intended to make holdings transferable which were before non-transferable, the Legislature in framing the Bengal Tenancy Act would have said so.

Section 117 of the Transfer of Property Act excludes agricultural lands from the operation of the rule which makes leasehold property transferable.

Hiramoti Dassya v. *Annoda Prosad Ghose* (1) followed.

SECOND APPEAL by Sreematee Aminnessa Bibi, the plaintiff.

* Appeal from Appellate Decree, No. 1539 of 1913, against the decree of T. K. Johnston, District Judge of Noakhali, dated April 22, 1913, modifying the decree of Hem Chandra Das Gupta, Munsif of Sudharam, dated April 30, 1912.

(1) (1908) 7 C. L. J. 555.

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AMINNESSA v. JINNAT ALI.

This appeal arose out of a suit for declaration of plaintiff's raiyati right to the land and khas possession thereof on the ground that the defendant who held it as a *miyadi-osat-raiyat* under the plaintiff has sold the land to defendant No. 1 and given up possession thereof and that the said holding was not transferable according to law or custom. Both the defendants Nos. 1 and 2 contested the suit and filed separate written statements supporting each other's case.

They contended that the plaintiff was a minor and that the suit, therefore, could not proceed, that the story of the transfer was not true, that the *kabala* executed was a paper transaction and not a real sale, that the defendant No. 2 executed it with defendant No. 1's knowledge to create a *benami* for fear of creditors, and that the defendant No. 2 and not the defendant No. 1 was still in possession of the land. Defendant No. 2 further contended that he was an occupancy *raiyat* and that the plaintiff was merely a co-sharer landlord and a suit for ejectment was, therefore, not maintainable at her instance.

The Court of first instance decreed the suit with costs. The plaintiff's raiyati right to the land in suit was declared and she was ordered khas possession of the same. Against this order of the Munsif the defendants appealed to the District Judge of Noakhali who reversed the decision of the Munsif and allowed the appeal. Hence this second appeal on behalf of the plaintiff.

Babu Hit Lal Guha, for the appellant. These under-raiyati leases, being agricultural leases, are exempted from the operation of the general law under s. 117 of the Transfer of Property Act. As there is no provision for their transfer in the Bengal Tenancy Act they cannot be transferred unless there is a valid

custom to that effect. The onus of proving such a custom was on the defendants and they have failed to do so. *Bonomali Bajadur* v. *Koylash Chunder Mojoomdar* (1) supports my contention, and though the ruling is based upon the old Rent Law of Bengal (Act X of 1869) still the Bengal Tenancy Act has not changed the law as laid down there. Further, the *obiter dictum* of Maclean C.J., in *Hiramoti Dassya* v. *Annoda Prosad Ghosh* (2), supports my contention.

The recent Full Bench ruling *Dayamayi* v. *Ananda Mohan Roy* (3) supports the same view.

Babu Hem Chandra Sen, for the respondent (defendant No. 2). The under-raiyati has not been really transferred. The whole transaction between defendants I and II is a *benami* one. I have an occupancy right which is transferable and as I have made ample provision for the due payment of rent, there could be no abandonment. There is nothing in the Bengal Tenancy Act which makes the transfer of an under-raiyati void or voidable: *Gozaffur Hossein* v. *E. Dablish* (4).

Babu Hit Lal Guha was not called upon to reply.

HOLMWOOD AND CHAPMAN JJ. This appeal arises out of a suit brought by the plaintiff for declaration of her raiyati right in the land in suit and khas possession thereof. It appears that the plaintiff became 16 annas tenant of an occupancy holding by purchase from her husband in the year 1314 and that she then found that the under-raiyat on the land who is defendant 2 had sold the under-raiyati to defendant No. 1 eight years before in 1306.

It is admitted that the lease was only for a term and it appears that now that lease must have expired,

(1) (1878) I. L. R. 4 Calc. 135.
(2) (1908) 7 C. L. J. 553.
(3) (1914) I. L. R. 42 Calc. 172.
(4) (1896) 1 C. W. N. 162.

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since more than 9 years have elapsed from the time when it was sold to defendant No. 1. Be that as it may, it is conceded that the learned Judge's finding that all leasehold property is saleable and that there is nothing in the Bengal Tenancy Act to prevent the sale of an under-raiyati is not a correct view of the law. That is a rule of English law and it is incorporated in the Transfer of Property Act. But the Transfer of Property Act by section 117 clearly excludes all agricultural lands from that rule, and the true rule is, as was laid down by the late Sir Francis Maclean in the case of *Hira Moti Dassya* v. *Annoda Prosad Ghose* (1), that when a tenure or holding, apart from the Transfer of Property Act, is not transferable it cannot become so unless it is expressly made so by some other statute. The learned Chief Justice pointed out, if it had been intended to make holdings transferable which were before non-transferable we might have expected the Legislature in framing the Bengal Tenancy Act to have said so. It was clearly laid down in 1878 by Chief Justice Garth and Jackson, J., that *jummaie* rights of a *korpha* under-tenant are not transferable without the consent of the raiyat landlord. Mr. Justice Jackson goes so far as to say, "I would only add that I never heard before that the question as to the possibility of selling a *korpha* tenant's right could be raised, and it appears to me to be contrary to the nature of things that such a thing could happen." The Tenancy Act has not made any change in the law as laid down there; and it must be held as a matter of law contrary to what has been said by the learned Judge in the Court below that an under-raiyati is not transferable.

That being so and the plaintiff being the landlord of the entire 16 annas and the defendant having

(1) (1908) 7 C. L J. 553, 555.

transferred the whole holding to defendant No. 1, the case falls within the second heading of the recent Full Bench ruling,—where the transfer of the whole holding has been made the landlord is ordinarily entitled to enter on the holding, and such a relinquishment as the relinquishment of the whole 16 annas without any proof of payment of rent or any arrangement made to pay the rent is certainly a relinquishment in fact which would entitle the plaintiff to eject the defendant.

It is sought to be argued that an under-raiyat cannot be ejected except under section 49 of Bengal Tenancy Act. But the answer to that is that the defendant No. 2 has by his own acts ceased to be an under-raiyat, and defendant No. 1 has never obtained the status of an under-raiyat, therefore section 49 does not apply. It has further been contended that every transfer does not operate as an abandonment or as forfeiture. But the transfer which is found as a fact by the Munsif in the first Court and has not been set aside by the Judge in this case is certainly such a transfer as would, in our opinion, constitute a complete abandonment in fact, and what is reliquishment or abandonment has been held by the Full Bench to depend on the substantial effect of what has been done in each case. The substantial effect of what has been done in this case appears to be that the recent purchaser has deprived the plaintiff of the tenant to whom alone she could look for her rent and to whom alone she could look for the proper cultivation of her holding; and we do not know who the defendant No. 1 may be or whether he is in any way a proper person to cultivate her land. It does not appear that any rent has been paid since the year 1306, at any rate, that it has been paid to the plaintiff.

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The appeal must, therefore, be decreed. The judgment and decree of the lower Appellate Court are set aside and those of the Munsif restored with costs in all Courts to the plaintiff.

S. K. B. *Appeal allowed.*

CRIMINAL REFERENCE.

Before Sharfuddin and Teunon JJ.

1914

Aug. 19.

EMPEROR

v.

SABAR AKUNJI.*

Pardon—Withdrawal by Magistrate not granting the pardon—Omission to state grounds of forfeiture—Necessity of formal withdrawal or declaration of forfeiture—Plea of pardon to be raised at the trial—Trial of issues of forfeiture of pardon and guilt of accused—Criminal Procedure Code (Act V of 1898), ss. 337, 339.

Under the present law no formal withdrawal of pardon nor formal declaration of its forfeiture are required. If the approver be subsequently proceeded against, it is open to him to plead at his trial that the pardon has not, in fact, been forfeited, that is, that he has not violated its conditions. The two questions of forfeiture of pardon and of his guilt of the offence in respect of which he received the same, may be heard and determined together, under the circumstance.

Emperor v. *Kothia* (1), *Kullan* v. *Emperor* (2), and *Emperor* v. *Abani Bhushan Chuckerbutty* (3) referred to.

ON the 29th October 1913 a dacoity was committed in the house of one Madan Mandal at the village of Gandamani in the Khulna district. A conditional

*Criminal Reference No. 129 of 1914 by J. H. A. Street, Officiating Sessions Judge of Khulna, dated May 26, 1914.

(1) (1906) I. L. R. 30 Bom. 611. (2) (1908) I. L. R. 32 Mad. 173.
(3) (1910) I. L. R. 37 Calc. 845, 851.

pardon was tendered under s. 337 of the Criminal Procedure Code, to one Sabar Akunji who accepted the same. He was examined before the committing officer at the preliminary inquiry against certain others charged with the dacoity, and made a full statement implicating himself and the accused. He was examined as a witness at the trial in the Sessions Court, on 3rd March 1914, when he professed complete ignorance of the dacoity. The case against the accused on trial was then withdrawn by the Crown.

On the next day Sabar was produced before the Subdivisional Officer who had granted the pardon, but was simply ordered to be remanded to *hajat*. The Magistrate was then transferred, and, on the 16th, a Deputy Magistrate, who was not then the Subdivisional Officer, passed the following order "The accused will be proceeded against under s. 395, of the Indian Penal Code." He was duly committed and the trial came on before the Sessions Court on the 25th May. After the jury were sworn and the Public Prosecutor had opened the case, the legality of the commitment was considered doubtful, and the Sessions Judge referred the case to the High Court, recommending that the commitment be quashed on the grounds (i) that the Deputy Magistrate who withdrew the pardon was not competent to do so, not being the successor in office of the Subdivisional Officer who had granted it; and (ii) that the grounds of the forfeiture of pardon had not been given by the Magistrate who had withdrawn it.

Babu Atulya Charan Bose, for the Crown.

No one appeared for the accused.

SHARFUDDIN AND TEUNON JJ. In this case it appears that one Sabar Akunji and a certain number of others

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were charged with the commission of a dacoity on the 29th of October 1913. Under section 337 of the Criminal Procedure Code pardon was tendered to Sabar Akunji and was accepted by him on the usual condition that he should make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence in question. In the Court of the Committing Magistrate it appears that Sabar Akunji did make a statement implicating himself and others in the commission of the dacoity. But when the trial took place in the Court of the Sessions Judge he resiled from that statement, and professed complete ignorance of the matter. Thereupon, proceedings were taken against him and he was committed to the Court of Session to take his trial. The learned Sessions Judge has thereupon made this reference to this Court with a view to have it declared that the proceedings taken against the accused were without jurisdiction on the ground that the pardon had not been declared forfeited, and the grounds of forfeiture had not been reduced into writing. Under the present Code of Criminal Procedure, no formal withdrawal of a pardon and no formal declaration that the pardon has been forfeited are required. If the person who has accepted a conditional pardon be subsequently proceeded against, it is open to him to plead on his trial that the pardon has not, in fact, been forfeited, that is to say that he has not violated the conditions on which the pardon was tendered and accepted. This then becomes one of the issues to be heard and determined at the trial. In the present case there is no need that the issue should be separately tried; for if on his statement made in the Court of the Committing Magistrate and on other evidence it be found that he took part in the commission of the dacoity in question, it will follow that when he resiled from his

first statement in the Court of Sessions and denied all knowledge of the matter, he violated the conditions on which the pardon had been tendered. So that the two questions whether he has forfeited the pardon and whether he has or has not been guilty of the offence of dacoity may be heard and determined together. In support of this view, and for the information of the Sessions Judge, we would refer him more particularly to the following reported cases: *Emperor* v. *Kothia* (1), *Kullan* v. *Emperor* (2) and *Emperor* v. *Abani Bhushan Chuckerbutty* (3). With these remarks we return the record and direct that the trial be now proceeded with.

E. H. M.

(1) (1906) I. L. R. 30 Bom. 611. (2) (1908) I. L. R. 32 Mad. 173.
(3) (1910) I. L. R. 37 Calc. 845, 851.

CRIMINAL REVISION.

Before Sharfuddin and Teunon JJ.

1914

Aug. 19

DEPUTY LEGAL REMEMBRANCER

v.

KAILASH CHANDRA GHOSE.*

Misjoinder—Wrongful confinement on one day, wrongful confinement and assault of the same persons on a subsequent day—Identity of transaction—Unity of object—Criminal Procedure Code (Act V of 1898) s. 239.

Where, in consequence of certain persons having killed a cow on a zamindar's estate contrary to practice and eaten its flesh, they were taken to the *cutcherry* on the 14th December, fined therefor and confined till they had furnished security for the payment of the fine within three days, and on their failure to do so were again taken to the *Cutcherry* and detained there, and on information given to the police, one of them was beaten and all ejected :—

Held, that the illegal confinement on the first day, and the similar confinement and assault on the second day were parts of the same transaction, the object of the accused on both days being the same, viz., to punish the persons for a breach of the rule by extorting the fine, and the assault on the second day being the conclusion of the transaction, and that the joint trial of the accused for offences under s. 347 of the Penal Code committed on the 14th and 18th and for that under s. 352 on the latter date by them was legal.

Emperor v. *Datto Hanmant Shahapurkar* (1), and *Emperor* v. *Sherufalli Allibhoy* (2) approved.

Budhai Sheik v. *Emperor* (3), and *Gul Mahomed Sircar* v. *Cheharu Mandal* (4) distinguished.

THE facts of the case were as follows. On the *Bakr-Id* day in September 1913, one Abdul Sheikh

* Criminal Revision No. 1034 of 1914 against the order of Annoda Charan Sen, Sessions Judge of Pabna, dated 12th May 1914.

(1) (1905) I. L. R. 30 Bom. 49.
(2) (1902) I. L. R. 27 Bom. 135.
(3) (1905) I. L. R. 33 Calc. 292.
(4) (1905) 10 C. W. N. 53.

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slaughtered a cow on the estate of Banamali Rai, a zamindar in the Serajganj district, in violation of a practice of the estate to the contrary, and three others, Mazam Ali Sheikh, Umed Ali Mandal, and Manik Sheikh, ate the flesh. The four men were taken to the *cutcherry* on the 14th December 1913 by some *peadas*, and the accused, Kailash Chandra Ghose, an inspector, and Ram Chandra Ghose, naib of the estate, fined them and kept them in the custody of the *peadas* in order to realize the fines. After they had paid Rs. 9 as *peadas'* fees and furnished security for the payment of the fines within three days, they were released. They, however, failed to pay the same on the due date, and were again taken to the *cutcherry* and confined. In the meantime information was given on their behalf to the police, and the fact coming to the knowledge of the accused, Kailash beat one of them under the orders of the naib, and ejected all of them from the premises.

The accused were placed on trial jointly before Babu Banamali Bagchi, Deputy Magistrate of Serajganj, and charged as follows :—

(i) That you, on the 14th December, at Deobhag *cutcherry*, wrongly confined Mazam Ali Sheikh, Abdul Sheikh, Umed Ali Mondal and Manick Ali, for the purpose of extorting money from them and thereby committed an offence under s. 347, I. P. C.

(ii) That you, on the 18th December, at the same place, wrongfully confined [the same persons] for the purpose of extorting money from them . . . . . an offence under s. 347, I. P. C.

(iii) That you, on the 18th December, at the same place, assaulted Mazam Ali Sheikh, and thereby committed an effence under s. 352, I. P. C.

The Magistrate convicted both petitioners, on the 30th March, under s. 347 of the Penal Code on both counts, and also under s. 352, and passed sentences of fine and imprisonment.

On appeal, the Sessions Judge of Serajganj held that the offences committed on the 14th and 18th

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December were not parts of the same transaction, and that the joint trial was, therefore, bad in law. He set aside the conviction and ordered a re-trial.

The Deputy Legal Remembrancer, thereupon, moved the High Court and obtained the present Rule.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown.

Mr. J. N. Roy, *Babu Harish Chandra Roy* and *Babu Jogendra Narain Mazumdar*, for the accused.

SHARFUDDIN AND TEUNON JJ. This Rule was issued calling upon the District Magistrate of Pabna and the opposite party to show cause why the order of the Sessions Judge, dated the 12th May 1914, should not be set aside, and the appeal re-heard on the merits. It appears that the two accused, Kailash Chandra Ghosh and Ram Chandra Ghosh, were tried under Sections 347, 352 and 352 coupled with section 114 of the Indian Penal Code, convicted and sentenced. On appeal to the Sessions Judge an order was passed for a retrial on the ground of misjoinder. In order to understand how the question of misjoinder arose certain facts have to be stated. There is a gentleman named Rai Banamali Rai Bahadur who is a zemindar. There is a prevailing practice in his estate that no one is allowed to slaughter cows. It appears that on the *Bakr-id* day just before the occurrence some Mahomedans slaughtered a cow. This was considered to be a breach of the practice of the estate, and on the 14th December four men, *viz.*, Mazam Ali Sheikh, Abdul Sheikh, Umed Ali Sheikh and Manik Sheikh, were called to the *Cutcherry* by two *peadas* and the inspector, and naib fined Abdul Sheikh Rs. 200 and Mazam Ali, Umedali and Manik Sheikh Rs. 50 each on account of the slaughter of the

cow. It appears that on the 14th December only Rs. 9 was realised and the rest was promised to be paid three days later. On the 17th, the rest of the money was not paid with the result that on the 18th these persons were again brought to the *cutcherry* and again confined. On coming to know that information had been sent to the police on behalf of the confined persons, they were beaten with shoes, and ejected from the place in which they had been wrongfully confined. The question is, whether the occurrence that took place on the 14th December and one that took place on the 18th December were two distinct transactions or form parts of one and the same transaction. It appears that the object was to punish certain Mahomedans of this estate for a breach of the rule of that estate in slaughtering a cow. It was with that object these four persons were brought to the cutcherry, fined and a portion of the fines realised. These men had promised to pay the balance of the fines three days later, but they failed to do so, and so on the 18th, it is said, wrongful confinement again took place. There can be no doubt, therefore, that what took place on the 18th was in continuation of what took place on the 14th. It has been contended that on the 18th, another offence was committed, namely, offences under Sections 352 and 352 read with Section 114 of the Indian Penal Code: therefore, this was a distinct offence and not in the same transaction, even supposing that the wrongful confinement on both days constituted one transaction. We think that the shoe-beating and other maltreatment of the Mahomedans when released from their wrongful confinement, were the concluding portions of the same transaction. They were all confined for one purpose, namely, for the purpose of extorting money, and on being informed that the police were coming,

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these men were shoe-beaten and turned out. The whole thing was really one transaction. The learned Sessions Judge was, however, of opinion that these were two distinct transactions. Therefore, he held that there was a misjoinder, and ordered a re-trial. The view that we have taken on the facts stated above is supported by the cases of *Emperor* v. *Datto Hanmant Shahapurkar* (1) and *Emperor* v. *Sherufalli Allibhoy* (2). Our attention has also been directed to two cases by Mr. Roy, the counsel for the accused, *viz.*, the cases of *Budhai Sheik* v. *Emperor* (3) and *Gul Mahomed Sircar* v. *Cheharu Mandal* (4). The facts of the two last-mentioned cases are different from the facts of the present case.

We, therefore, make the present Rule absolute, set aside the order of the learned Sessions Judge, dated the 12th May 1914, and direct that the appeal be now heard on the merits.

Let this record be sent down at once.

E. H. M. *Rule absolute.*

(1) (1905) I. L. R. 30 Bom. 49.
(2) (1902) I. L. R. 27 Bom. 135.
(3) (1905) I. L. R. 33 Calc. 292.
(4) (1905) 10 C. W. N. 53.

PRIVY COUNCIL.

DHIRAJ CHANDRA BOSE

v.

HARI DASI DEBI.

P.C.*
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Oct. 29 ;
Nov. 2.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Sale for arrears of revenue—Setting aside sale—Irregularity—Arrears under Act XI of 1859 paid—Embankment charges due—Sale under Act XI of 1859 as for arrears of revenue instead of under Public Demands Recovery Act (Beng. Act I of 1895 as amended by Beng. Act I of 1897) —Embankment Act (Beng. Act II of 1882).

In this case the High Court set aside a sale for arrears of revenue, holding that where the Collector had acknowledged payment in full of the arrears of land revenue for which the sale had been advertised, and had elected to proceed by certificate procedure against an arrear of a different character, and had already directed a sale under that procedure, he could not turn round and treat the arrear under the certificate as an arrear of land revenue without any notice to the parties under section 5, and proceed to sell under the land revenue proclamation on the mere ground that no special exemption order had been passed. The embankment charges ordered to be levied under the Certificate Act (Beng. Act I of 1895 as amended by Beng. Act I of 1897) were taken out of the purview of Act XI of 1859 unless and until fresh notices were issued under section 5, and they could not be treated as arrears of land revenue. The sale, therefore, not being for an arrear of land revenue, was liable to be set aside. An appeal from that decision was dismissed by their Lordships of the Judicial Committee, who said they saw no reason to interfere with it.

APPEAL 64 of 1913 from a judgment and decree (4th July 1910) of the High Court at Calcutta which reversed a judgment and decree (29th March 1909) of the Subordinate Judge of Midnapur.

The defendants were the appellants to His Majesty in Council.

*Present : LORD DUNEDIN, LORD SHAW, SIR JOHN EDGE, AND MR. AMEER ALI.

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The only question for determination on this appeal was whether the first respondent, Hari Dasi Debi, was entitled to have set aside the sale of an 8 annas share of mahal Gumukpota, pergana Kastirjora which had taken place by order of the Collector of Midnapur under Act XI of 1859.

She was the recorded proprietor of the share in the zamindari in respect of which a separate account known as No. 1 had been opened in the Collectorate Register. It had been purchased by her on 23rd November 1904 at an execution sale, and she had mortgaged it to the second appellant Hem Chandra Bose, who in a suit (189 of 1906) on the mortgage brought in the Court of the Subordinate Judge of Midnapur, had obtained on 9th June 1906 a decree against her for a sum of Rs. 13,000 with costs.

Hari Dasi Debi was in arrears in payment of the Government revenue, and also of certain cesses, rates and charges, which were by law realizable as arrears of Land Revenue, payable in respect of her share of the mahal; and among others, in respect of certain embankment charges due prior to September 1906, and also in respect of the quarterly kist of the Government Land Revenue due on 12th January 1907. As to these arrears notices, dated 16th February 1907, were duly issued and published under sections 6 and 13 of Act XI of 1859, fixing 26th March 1907 at 12 o'clock for the sale of the first respondent's share for recovery of the arrears of revenue and the other demands which by law are recoverable as arrears of Land Revenue. Notices were also duly issued under Section 7 of the Act to the raiyats and other tenants not to pay rents to the respondent.

On 13th March 1907, a further certificate for Rs. 69-13-9 was filed in the Collectorate under the Bengal Embankment Act (Bengal Act II of 1882) against the first

respondent in respect of certain additional embankment charges, payment of which was in arrear.

On 6th March 1907, the appellant Hem Chandra Bose obtained a decree in suit 189 of 1906 which barred his mortgagor's (the first respondent's) right of redemption.

On 18th March 1907, the first respondent through her Naib applied to the Collector of Midnapur to be allowed to deposit the arrears of revenue due, but her application was refused. On 23rd March 1907, she presented a petition to the Collector by a pleader for exemption of the share of the mahal Gumukpota from sale, admitting the default in respect thereof, and expressing her willingness to deposit the "arrears of revenue, etc."; and on that petition, which was made under Section 18 of Act XI of 1859, the Collector on 25th March made an order that the arrears might be accepted if paid on that day. On 25th the first respondent through her agents deposited with the Collectorate Rs. 807 in respect of the arrears due by her, that sum being short of the full amount required to be paid by Rs. 69-13-9. On 26th March, on the deficit being reported to him, the Collector directed that the sale must proceed; and on that day (which was the day fixed for the sale) the share in mahal Gumukpota was duly sold, and was purchased by the second respondent, Nanda Lal Mullick, for Rs. 500, and he at once deposited Rs. 125, part of the purchase-money in compliance with the requirements of Act XI of 1859.

On 27th March, the respondent Hari Dasi Debi petitioned the Collector to set aside the sale. The purchaser on 24th April paid to the Collectorate under section 23 of the Act, Rs. 375 the balance of his purchase-money.

On 24th May 1907, the Collector confirmed the sale and ordered a certificate of title to be issued to the

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purchaser. On the same day the respondent, Hari Dasi Debi, presented an appeal against the sale to the Commissioner of the Division under section 26 of the Act: and the appeal was on 26th July considered by the Commissioner and dismissed; whereupon, the sale became final and conclusive under section 27 of the Act; and on 12th August a sale certificate was granted to the purchaser under section 28.

Meanwhile, on 19th June 1907, the right title and interest of the respondent, Hari Dasi Debi, in the 8 annas share of the mahal Gumukpota had been put up for sale under the decree of 9th June 1906 in the mortgage suit 189 of that year, and purchased by the second appellant, Hem Chandra Bose; and on 23rd November 1907 that sale was confirmed by the order of the Court.

The suit giving rise to the present appeal was instituted by Hari Dasi Debi on 18th January 1908 against the appellant Dhiraj Chandra Bose, and the purchaser Nanda Lal Mullick who had parted with his interest in his purchase to the first defendant.

The plaintiff alleged (*inter alia*) in her plaint that her agent had on 25th March 1907 deposited only Rs. 807 in payment of arrears in consequence of information given him by the clerk in the Arrears Collection Department of the Collectorate; that the sale was invalid, illegal, and erroneous on a number of grounds, and that the property had in consequence been sold at a very inadequate price, and she prayed that the sale might be set aside.

The defendants denied (*inter alia*) that the plaintiff's agent had either received or acted on information obtained from the clerk of the Arrears Collection Department in the matter of depositing only Rs. 807; and also denied that the sale was in any way illegal, invalid or erroneous; and they alleged that certain

grounds now put forward in the plaint had not been stated in her appeal to the Commissioner; that the sale in question had become final and conclusive, and a sale certificate had been granted, and that the grounds and objections raised in the plaint could not now be entertained, or the sale set aside; and that the plaintiff's interest in the property having passed to the appellants, she had no further interest to enable her to maintain the suit.

The following were the issues so far as they are now material:—

"*6th.*—Whether the sale referred to in the plaint is invalid and liable to be set aside?

7th.—Whether the proceedings under section 5 of Act XI of 1859 were adopted before the sale? If not, whether the sale can stand according to law?

8th.—Whether the Arrears Collection Officers informed the plaintiff's man to deposit Rs. 807 only? If so, whether the sale is bad?

9th.—Is the plaintiff entitled to any relief? If so, what?

10th.—Whether there were any arrears of revenue due by the plaintiff, for which the property was sold?"

The Subordinate Judge held that the order made on 25th March 1907 that "the arrears might be accepted if paid on that day" did not amount to an order of exemption, because the condition was not fulfilled, for the arrears were not paid off on 25th March; that the sale duly and properly took place for the arrears of revenue for which the property was liable, and it was valid and final; that the objection raised under section 5, clause (*3*) of Act XI of 1859 was not open to the plaintiff, and was not applicable to the case, inasmuch as the sale had taken place for recovery of arrears of revenue, and no proceedings under section 5 were necessary; and that in fact the clerk of the Arrears Collection Department of the Collectorate did not mislead the plaintiff's agent, and even if he had

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done so, the Court had no power to grant relief to the plaintiff on that ground.

An apppeal by the plaintiff came before a Divisional Bench of the High Court (HOLMWOOD and SHARFUDDIN JJ.) who (after deciding that the plaintiff had sufficient interest in the property in suit to enable her to maintain the appeal to which a preliminary objection had been taken on the ground that she had no competence to support it) delivered judgment and made a decree reversing the decision of the Subordinate Judge, and decreeing the suit and the appeal with costs.

The material portions of their judgment are as follows:—

"We may mention that although the point now in issue, namely, whether the estate could be sold for arrears of pulbandi only under Act XI of 1859 without taking the necessary steps under section 5 of the Act, was raised in express terms in the appeal to the Commissioner, it does not appear that the point was urged before him, or if it was, he did not consider it necessary to notice it. The question, however, which would arise under section 33 of the Act is not material, inasmuch as it is admitted that if this was a sale under the Revenue Sale Law at all, it cannot be set aside.

"The only point which really arises in this case is whether the sale for an arrear of Rs. 69-13-9 for pulbandi, which was already the subject of a certificate, the sale under which was fixed for the same day, 26th March, could be held under the Revenue Sale Law in face of the fact that the Collector's ledger book, the chalans given to the plaintiff, the rubokari of the 24th May 1907 and the order for sale on the account list of arrears of revenue payable, all show that the revenue and other charges had been fully paid up, and that nothing remained due but the sum of Rs. 69-13-9 under the certificate 4654. The account list clearly refers to the certificate, and the Collector must have known when he passed the order that the only debt due from the estate was already the subject of a certificate decree, or if he did not, the plaintiff ought not to suffer for his laches. Now, this certificate was issued not only against the plaintiff as proprietress but against one Jogendra Nath Pathak, the usufructuary mortgagee in possession, and this is urged as a further ground for holding that the estate could not be sold under Act XI of 1859 as for an arrear of Government revenue. No arrear of Government revenue was or could be due from Jogendra Nath

Pathak, yet he was equally liable with the plaintiff for the pulbandi arrear for which the estate was actually sold.

"The Subordinate Judge refused to admit the Collector's ledger, as it was tendered at a late stage of the case, but we thought it right to admit it as a public document about which there was no dispute, and the learned vakil for the respondents very frankly admitted that he could have no objection to its going in, though he asked us at the same time to take in the judgment in appeal of the Commissioner. This we saw no objection to doing and we have already dealt with it above. We may point out that there is evidence that the existence of the arrear of Rs. 69-13-9 may have purposely been withheld from the plaintiff, for we find certain pencil calculations on the back of Ex. I, showing that the person who estimated the plaintiff's dues at Rs. 807-1-1 had Ex. I actually before him and in his hands when he made the calculation. One of the witnesses who knows the mohurir Prabhat Chandra's hand-writing well and who attests it in the entries made in ink in Ex. I, does not venture to deny that the pencil entries are his, but says he cannot make out in whose writing they are. This witness, Utpal Chandra Bhattacharji, Land Revenue Towzi mohurir, says that parties have always made all necessary enquiries from Prabhat, and this practice has been going on ever since he joined the department. He significantly asks 'From whom but Prabhat Babu should parties get these informations as to how much is deposited?' and this rather discounts the value of the Commissioner's judgment which is based on the fact that plaintiff's agent had no business to rely on casual enquiries from a busy man like the mohurir Prabhat on the day before the sales. Prabhat himself gives a very half-hearted denial to the pencil entries, and we must take it that he alone had the opportunity of making them. He does not deny that the karpardaz came to him for information, but says he does not remember, but he admits that he was the man who the very next day certified to the Collector that Rs. 69-13-9 remained unpaid, without drawing any attention to the fact that this sum was due under a certificate for pulbandi, although the order-sheet was before him, and he boasts in his evidence that he could not make an incorrect statement under those circumstances. Yet the order-sheet clearly shows the reference number of the certificate on the face of it.

"We fully appreciate the importance of the dictum of their Lordships of the Judicial Committee in the case of *Gobind Lal Roy* v. *Ramjanam Misser* (1) that any thing which impairs the security of purchases at revenue sales tends to lower the price of the estates put up for sale, and that the purchaser should not be exposed to the danger of having his sale set aside

(1) (1893) I. L. R. 21 Calc. 70, 83 ; L. R. 20 I. A. 165, 174.

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after a year upon new grounds. But the ground taken in this case is not new. It is the ground that has been apparent on the face of the Collectorate proceedings from the beginning and was taken in the grounds of appeal to the Commissioner. Having regard to the carelessness apparent in this case, with which any and every statement of a mohurir is accepted by the subordinate revenue officers and passed on to the Collector, and to the immense temptation these mohurirs are under to traffic in revenue-sales, we think that the evidence of the *bona fides* of the mohurirs should be most carefully scrutinized, and when, as in this case, there appears *primâ facie* suspicion of misrepresentation, the technical effect of the Collector's orders should be very strictly interpreted in favour of the plaintiff.

"There is no direct evidence of an attachment under the certificate for Rs. 69-13-9, but the certificate itself obtained the force of a decree on 12th March 1907 when it was filed, and the order for sale on 26th March, which was passed on the same day, is clearly an order for execution of the decree by sale, and operates as an attachment within the meaning of section 17, for the words of that section are not 'ordered to be attached,' but 'held under attachment by the revenue authorities otherwise than by order of a judicial authority'; but the sale is not bad on that ground alone, since the attachment, if any, was made after the last day of payment and after the estate had become liable to sale for arrears of Government revenue: *Bunwari Lall Sahu* v. *Mohabir Persad Singh* (1). But the main ground for holding that the sale must be set aside is that it is not for arrears of revenue at all. Section 33 says 'no sale for arrears of revenue shall be annulled by a Court of Justice,' it does not say 'no sale purporting to be for arrears of revenue shall be set aside.'

"It is in vain to say that the Collector could have sold the estate for arrears of embankment charges if he had not issued a certificate and had proceeded under section 5 of the Act.

"It is urged that the omission to proceed under section 5 is a mere irregularity, but their Lordships of the Judicial Committee did not lay this down in *Gobind Lal Roy's Case* (2), and the only authority we have been referred to the case of *Deonandan Singh* v. *Manbodh Singh* (3) merely says that the non-issue of a notice under section 5 is an irregularity which does not make a sale a nullity unless the ground has been specified in the appeal to the Commissioner. This case is rather in plaintiff's favour, and in any case no notice under section 5 was held to be necessary in that case, as the arrears were not other than those of the current year and of the year

(1) (1873) 12 B. L. R. 297; L. R. 1 I. A. 89.

(2) (1893) I. L. R. 21 Calc. 70; L. R. 20 I. A. 165.

(3) (1904) I. L. R. 32 Calc. 111.

immediately preceding. But to say that no notice under section 5 is necessary when the sale is not for arrears of revenue at all but for other demands recoverable by the same process as land revenue, is going very much farther than any authority with which we are acquainted, more especially when the arrears of pulbandi are already under process of recovery by the certificate procedure.

"It is useless to enter into an examination of all the facts and documents referred to by the learned Subordinate Judge. The first five issues which he set himself to try were decided in favour of the plaintiff. The 10th issue was the most important in the light of the questions as framed, and the principal part of his judgment is upon this, *viz.*, whether there were any arrears of revenue due by the plaintiff for which the property was sold.

"It is, of course, perfectly clear that the head note to Ex. 12 which is the certified copy of the Collector's order, Ex. 1, is not part of the document at all. But we have the whole document in original and that document shows that the Collector was misled into thinking that the arrear of Rs. 69-13-9 which clearly appears by the reference to the certificate to be an arrear of pulbandi was as a matter of fact, an arrear of revenue, and on this he ordered an immediate sale on the sale-proclamations already issued under section 6 of Act XI of 1859. The proclamation shows that the arrear of land revenue was Rs. 547-10-10.

"Now, it is clearly established by the Collectorate ledger exhibited in this Court, by the chalans, Ex. 2 (series) and by the Collector's rubokari on the 24th May 1907 that this Rs. 547-10-10 had been fully paid up and receipts granted for it. It is true no formal order of exemption had been passed in respect of it, and, therefore, the estate was still liable to sale for this arrear as advertised, but it is equally clearly established by these same papers that the estate was not sold for those arrears but for the 69-13-9 due for pulbandi under the certificate.

"These are all the findings of fact that are necessary to dispose of issues 6 to 10.

"Applying the law as we understand it and following the principles laid down by the Judicial Committee in the case of *Gobind Lal Ray* v. *Ramjanam Misser* (1), we are of opinion that the sale as held on the 26th March 1907 was not a sale for arrears of land revenue and that it was not competent to the Collector to hold such a sale under Act XI of 1859.

"It appears to us that when the Collector has acknowledged payment in full of the arrears of land revenue for which the sale was advertised, and has elected to proceed by certificate procedure against an arrear of a

(1) (1893) I. L. R. 21 Calc. 70 ; L. R. 20 I. A. 165.

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different character, and has already directed a sale under that procedure, he cannot turn round and treat the arrear under the certificate as an arrear of land revenue, without any notice to the parties under section 5, and proceed to sell the property under the land revenue proclamation on the mere ground that no special exemption order has been passed. The embankment charges ordered to be levied under the Certificate Act are taken out of the purview of Act XI of 1859 unless and until fresh notices are issued under section 5, and they cannot be treated as arrears of land revenue. The sale, therefore, not being for an arrear of land revenue, is liable to be set aside, and the judgment and decree of the Subordinate Judge must be discharged with costs."

On this appeal, which was heard *ex parte*,

A. M. Dunne, for the appellant, contended that the sale had taken place in conformity with the provisions of Act XI of 1859 and was valid, final, and conclusive; and the respondent had not proved in connection with the sale any irregularity by which she had sustained substantial injury. Her application to the Collector for exemption was made under section 18 of the Act which provided that "the Collector shall duly record in a proceeding the reason for granting such exemption." The order made by the Collector on the petition, therefore, authorising the Collectorate office to receive the arrears due, if paid on that day (25th March) without giving any reason, was not an order for exemption but a preliminary proceeding which was necessary before an order for exemption could be made. The failure to deposit the arrears due was a matter for which the respondent and her agents were entirely responsible. It was well known to her and to them that without an order for exemption being made, the sale must take place; that all the arrears then due and payable in respect of land revenue, cesses, embankment charges, &c., had to be deposited on 25th March in order to obtain the exemption asked for, and it was entirely the fault of herself and her agents that the correct amount was not paid into the Collectorate.

Section 6 of Act XI of 1859 provided that "the property shall on the day notified for sale be put up to auction and sold to the highest bidder, and that no payment or tender of payment made after the latest date for payment" (in this case 12th January 1907) "shall bar or interfere with the sale, either at the time of sale or after its conclusion." No ground had been established by the respondent entitling her to have the sale set aside; and the Court had no jurisdiction under section 33 of Act XI of 1859 to annul the sale or to disturb the title of the purchaser. [LORD SHAW referred to *Mahomed Jan* v. *Ganga Bishun Singh* (1).] The respondent had, moreover, it was submitted, at the date of the suit, no interest in the property entitling her to have the sale set aside.

The judgment of their Lordships was delivered by

LORD DUNEDIN. This is an appeal heard *ex parte*, and whenever this is the case it is a matter of considerable anxiety to the Board. But in this appeal that anxiety was certainly relieved by the exceedingly fair and candid way in which it was presented by the learned counsel for the appellants. In the result, upon a full consideration of the circumstances, their Lordships see no reason for interfering with the judgment of the Court below.

Nov. 2.

They will, therefore, humbly advise His Majesty to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: *Watkins & Hunter.*

J. V. W.

(1) (1911) I. L. R. 38 Calc. 537; L. R. 38 I. A. 80.

PRIVY COUNCIL.

P. C.*
1914

Nov. 5.

MUNNA LAL PARRACK

v.

SARAT CHUNDER MUKERJI.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Limitation—Preliminary Mortgage-decree—Limitation Act (IX of 1908) Sch. I, Arts. 180, 183—Application for sale of mortgaged property under decree—Transfer of Property Act (IV of 1882) ss. 85 to 89—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 5.

In this case their Lordships of the Judicial Committee affirmed the decision of the High Court in *Amlook Chand Parrack* v. *Sarat Chunder Mukerjee* (1) that an application for an order absolute for sale under a mortgage decree is an application "to enforce a judgment or decree" within the meaning of Art. 183 of Sch. I of the Limitation Act (IX of 1908), and is therefore barred if not made within the period prescribed by that Article.

APPEAL No. 18 of 1914 from an order (20th July 1911) of an Appellate Bench of the High Court at Calcutta which affirmed an order (13th May 1910) of a Judge sitting in the exercise of the original civil jurisdiction of the same Court.

The representatives of the plaintiff were the appellants to His Majesty in Council.

The only question for determination on the present appeal was whether an application made on 3rd July 1909 to execute or enforce a decree made by the High Court on 16th December 1886 was or was not barred by the Limitation Act. Both Courts in India held that it was barred.

* *Present*: LORD SHAW, LORD PARKER, LORD SUMNER, SIR JOHN EDGE, AND MR. AMEER ALI.

(1) (1911) I. L. R. 38 Calc. 913.

The necessary facts were shortly as follows. On 25th January 1886 the first respondent, Sarat Chunder Mukerji, executed a mortgage in favour of one Amlook Chand Parrack (the predecessor in title of the appellants) of one-third share in certain properties which he was then claiming in litigation pending in the High Court to secure a sum of Rs. 25,500 and interest. The sum so secured was made repayable under the mortgage on 1st July 1886.

As the money was not paid on the due date, the mortgagee instituted a suit in his mortgage in the Calcutta High Court, and on 16th December 1886 a consent decree was made in the suit for Rs. 25,382-8 annas to be paid on 15th June 1887, and it was provided that in default of payment the mortgaged properties should be sold, and that the mortgagor should be liable for any deficiency there might be on the sale.

In the course of the litigation (which was protracted), as to the first respondent's share in the mortgaged properties, he sold a one-fourth share in one of the properties to one Narendra Krishna Bose, who subsequently transferred his interest to Upendra Lal Bose, the second respondent. The result of the litigation was a decree made on 3rd November 1903, by which the first respondent was declared entitled to an undivided one-fourth share in some of the mortgaged properties, and a partition was directed to be made, the proceedings in which only came to an end early in 1909; and shortly before the Partition Commissioner made his report, the mortgagee made in his mortgage suit the application which gave rise to the present appeal, namely, that the second respondent should be made a party-defendant to the suit, and that he (the mortgagee) might be at liberty to sell the shares of the mortgagor and the second respondent in the mortgaged properties.

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The application was heard by FLETCHER J. sitting in the exercise of the Original Civil Jurisdiction of the Court, and he held that it was an application to enforce a decree within the meaning of article 180 of Schedule II of the Limitation Act (XV of 1877), and that not having been made within the period prescribed by that article the application was barred.

An appeal by the mortgagee was heard by a Divisional Bench (SIR LAWRENCE JENKINS C.J., and WOODROFFE J.) of the High Court and was dismissed.

The mortgage decree of 16th December 1886 and the judgment of the Appellate Court will be found set out in the report of *Amlook Chand Parrack* v. *Sarat Chunder Mukerjee* in I. L. R. 38 Calc. 913.

On this appeal,

Jenkins, *K.C.*, and *Sir W. Garth*, for the appellants, contended that the application was not one to enforce a decree within the meaning of either article 180 or 183 of Schedule I of the Limitation Act (IX of 1908); for the decree of 16th December 1886 was a preliminary mortgage decree which could not be enforced or executed itself, but required a supplemental decree or order absolute for the purpose of being 'executed'. The application, therefore, it was submitted, was not barred. Reference was made to the Transfer of Property Act (IV of 1882) sections 85 to 89, which were now to be found in the Civil Procedure Code (Act V of 1908), Order XXXIV, rule 5. This was an application for which no period of limitation was provided in the Limitation Act. The question was whether an application for a preliminary decree was sufficient for execution of the mortgage decree, or rather whether an application for a final decree would be sufficient for execution of the preliminary decree? It was submitted it would not.

[*De Gruyther*, *K.C.*, referred to the cases of *Abdul Majid* v. *Jawahir Lal*(1) and *Batuk Nath* v. *Munni Dei* (2) in which it was held by this Board that such an application as the present one was barred if not made within the period prescribed by the Limitation Act.] The articles referred to in the cases cited were those applying to the inferior Courts and not to the High Court as established by Charter; and reference was made to *Madhabmani Dasi* v. *Lambert* (3) as being in favour of the appellant,

De Gruyther, *K.C.* and *A. R. Macklin*, for the respondents, were not called upon.

The judgment of their Lordships was delivered by

Nov. 5. LORD SHAW. Their Lordships see no reason for interfering with the decisions of the Courts below, and they will humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitor for the appellants: *G. C. Farr.*

Solicitors for the respondents: *J. E. Fox & Co.*

J. V. W.

(1) (1914) I. L. R. 36 All. 350.
(2) (1914) I. L. R. 36 All. 284; L. R. 41 I. A. 104.
(3) (1910) I. L. R. 37 Calc 796; 15 C. W N. 337.

CIVIL RULE.

Before Sharfuddin and Teunon JJ.

1914

Nov. 23.

TARAK NATH ADHIKARI

v.

BHUBANESHWAR MITRA.*

Mortgage—Sale of mortgaged property for any claim of mortgage unconnected with mortgage—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14—Transfer of Property Act (IV of 1882), s. 99.

A mortgagee is competent, under the Civil Procedure Code of 1908, to have his mortgaged property sold in satisfaction of any claim which he may have against the mortgagor, though the claim may be unconnected with the mortgage.

CIVIL RULE obtained by Tarak Nath Adhikari and others, the judgment-debtors.

The decree-holder (opposite party in this Rule) brought a suit against the judgment-debtors (petitioners hereof) in the first Court of the Subordinate Judge of Midnapore on a note of hand and obtained a decree on the 6th of January, 1913. The decree-holder brought another suit in the said Court against the petitioners and other persons for the recovery of Rs. 11,000 and odd due to him on several mortgages and prayed for sale of the mortgaged properties. While the said mortgage-suit was pending, the decree-holder caused some of the mortgaged properties to be attached and sold on the 21st July, 1913, in execution of the said money decree obtained by him on the 6th of January 1913, against the petitioners, and purchased those properties, it was alleged, in the

* Civil Rule No. 881 of 1914, against the order of W. N. Delevingne, District Judge of Midnapore, dated May 29, 1914, reversing the order of Behari Lal Sarkar, Munsif of that District, dated March 17, 1914.

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benami of one Tinkarhi Basu, one of the opposite party in this Rule, for Rs. 1,002. The petitioners, thereupon, made an application to set aside the sale on the grounds, *inter alia*, that there was fraud and material irregularity in publishing and conducting the sale and that there was substantial injury by reason thereof. The learned Munsif of Midnapore set aside the sale on the grounds alleged. On appeal, the learned District Judge reversed the decision of the Munsif, holding that the petitioners had failed to establish substantial injury by reason of the fraud or material irregularities complained of. Thereupon, the petitioners applied to the High Court mainly on the ground that the sale was contrary to the provisions of Order XXXIV, rule 14 of the Code.

Dr. Rashbehary Ghose (with him *Babu Mohini Mohan Chatterji*), for the petitioner, contended that under the old law, as contained in s. 99 of the Transfer of Property Act, it was not competent to a mortgagee to sell mortgaged property in satisfaction of any claim, whether arising under the mortgage or not, except by institution of a suit under s. 67 of that Act. Though s. 99 of the Transfer of Property Act is now replaced by Order XXXIV, rule 14, Civil Procedure Code, there has not been any material change in the law. Moreover, the finding of the Munsif is that the mortgagee himself purchased the properties in the *benami* of the auction-purchaser, opposite party, and that finding has not been reversed by the District Judge. We must therefore take it that the mortgagee himself purchased the mortgaged property, and he must consequently be regarded as holding the property as a trustee for the mortgagor: *Pacham Lal Chowdhury* v. *Kishun Pershad Misser* (1). The sale therefore is not binding

(1) (1910) 14 C. W. N. 579.

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on the petitioners mortgagors and they are entitled to avoid it.

Babu Baidyanath Dutt (with him *Babu Mohini Nath Bose*), for the opposite party. Order XXXIV, r. 14 of the Civil Procedure Code, has changed the law by restricting the operation of rule 14 to cases where a mortgagee has obtained a personal decree against the mortgagor on the mortgage debt. There is therefore no bar now to the mortgagee bringing the mortgaged property to sale for a debt unconnected with the mortgage. The point raised by Dr. Ghose does not arise in the present proceeding, but it might arise in any subsequent proceeding.

Babu Mohini Mohan Chatterji, in reply. The language of Order XXXIV r. 14, does not support the view contended for by the opposite party.

SHARFUDDIN AND TEUNON JJ. This is a Rule on the opposite party to show cause why the order passed by the learned Judge in appeal should not be set aside on the ground that the sale was contrary to the provisions of Order XXXIV, rule 14, and also on the ground that the sale was made without taking the permission of the Court which appointed a receiver.

The second point (in the Rule) has not been argued by Dr. Ghose who appeared on behalf of the petitioner.

The petitioner is the judgment-debtor. Some of his properties have been sold and he complains against the sale. It appears that the opposite party had obtained a money-decree against the judgment-debtor and in execution of that money-decree, he sold and purchased certain properties which were mortgaged to him by the petitioner judgment-debtor under a certain mortgage deed. The opposite party had also instituted a mortgage suit for the recovery of his

mortgage money under his mortgage deed and while this mortgage suit was pending, he executed his money-decree and in execution of the decree purchased some of the mortgaged properties himself. The case for the petitioner is that notwithstanding the fact that an alteration in the law has been made by the provisions of Order XXXIV, rule 14, of the present Civil Procedure Code, section 99 of the Transfer of Property Act should be given effect to. We find, however, that under the provisions of section 99 of the Transfer of Property Act a mortgagee could not bring the mortgaged property to sale in satisfaction of any claim whether arising under the mortgage or not, except by institution of a suit under section 67 of that Act. Order XXXIV, rule 14 has introduced a change, limiting the restriction on the mortgagee's right to sell the mortgaged properties to claims arising under the mortgage. It is clear, therefore, that the Code has repealed section 99 of the Transfer of Property Act and in its place this present rule has been enacted. The first part of the section provided that a mortgagee should not bring the mortgaged property to sale otherwise than by instituting a suit under section 67 of the Transfer of Property Act. In so far as it precluded the mortgagee from selling the mortgaged property under a judgment unconnected with the mortgage debt, the restriction has been considered inexpedient and has been removed. It follows, therefore, that a mortgagee is competent to have his mortgaged property sold in satisfaction of any claim which he may have against the mortgagor unconnected with the mortgage.

For the above reasons, we discharge this Rule with costs.

S. M. *Rule discharged.*

APPELLATE CRIMINAL.

Before Fletcher and Beachcroft JJ.

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Nov. 5.

HARI KRISHNA

v.

EMPEROR.*

Evidence—Disbelief of greater part of the evidence of the prosecution witnesses—Conviction on the residue—Propriety of the conviction—Practice.

When the prosecution witnesses are found to be untruthful as to the greater part of their evidence, it would be dangerous to convict the accused on the residue without corroboration.

THE appellant was tried with three others before the Sessions Judge of Cuttack, with the aid of Assessors, under ss. 330 and 348 of the Penal Code. One of the Assessors was of opinion that the charge of wrongful confinement by all the four had been proved, but not the branding. The other held that that neither offence was established against any of the accused. The Judge acquitted three but convicted the appellant, on the 5th August 1914, and sentenced him, under both sections, to concurrent terms of imprisonment.

The story of the prosecution was as follows. The accused, Kunja and Hari Krishna, who were uncle and nephew, lived in a joint family of which Jagannath was the head, and Radha Gobind and Kristo, two brothers, lived close by as members of another joint family. Two labourers, Narsingh and Moni, were employed in certain excavations in one of the rooms

* Criminal Appeal No. 634 of 1914, against the order of S. B. Dhavle, Sessions Judge of Cuttack, dated August 5, 1914.

of Jagannath's house on the 7th May 1914, and found a small *ghoti*, or earthen vessel, containing husks of rice believed to be associated with buried treasure. Hari first heard of the discovery and demanded the treasure from the two men. On their failing to produce the same, Hari, Kunja and others assaulted and confined them in the room about midday. In the afternoon Radha and Kristo arrived and tried to recover the buried treasure from Narsingh. A conference of the four accused was held thereafter, and the labourers were taken to the room where Kristo and Kunja branded Narsingh, and Radha and Hari treated Moni similarly. Certain persons heard the cries of the two maltreated men and met them after their release by the accused, and the men related what had happened. Kamala Debya, the wife of Moni, lodged an information on the morning of the 9th, and on the same day Narsingh complained to the President of the Union. The Assistant Surgeon, who examined their injuries on the morning of the 10th, was of opinion that they could not have been inflicted less than 72 hours before.

The Sessions Judge disbelieved all the prosecution witnesses generally, but selected, without any corroboration, certain passages from their evidence, which he believed to be the correct story, and on his own est mate of their truthfulness, he convicted the appellant, Hari Krishna.

Babu Dasarathi Sanyal and *Babu Debendra Nath Bhattacharjee*, for the appellant.

Mr. S. Ahmed, for the Crown.

FLETCHER J. The appellant before us, Hari Krishna *alias* Hari Misra, was tried along with three other persons before the learned Sessions Judge of Cuttack

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FLETCHER J.

with the aid of Assessors for having committed certain offences under sections 348 and 330 of the Indian Penal Code. The Assessors came to the conclusion that none of the accused were guilty. The learned Judge, agreeing with the Assessors with regard to three of the accused, acquitted them, but disagreeing with the Assessors with regard to the appellant before us convicted him and sentenced him to undergo 18 months' rigorous imprisonment. This is the interpretation placed by the learned Judge on the opinion of the Assessors. It may, however, be said that in the opinion of one of the Assessors, as would appear from the record, all four accused were guilty of wrongful confinement. The appellant before us is a young man, aged about 20 years, who is said to be a student apparently studying Sanskrit with a view ultimately to becoming a *pandit*.

The case is really an extraordinary one on the evidence, because the learned Judge has disbelieved all the witnesses in the case. In fact he described them as liars of varying degrees. But he has selected, without any corroboration at all, certain passages from the evidence which he believed to be the correct story; and on his own estimate as to whether that story is true or not he has convicted the appellant before us.

Now, in a case like this it is obvious that the opinions of Assessors are entitled to considerable weight. They are gentlemen of the neighbourhood, knowing the language and habits of the people. Their opinion was that a portion of the case was not proved as against any of the accused. As regards the remainder of the case it may be that they differed in their opinions.

Now, the story itself is also an extraordinary one. Two of the accused, namely, Kunja and the appellant before us, were uncle and nephew living together jointly. The two other accused, Radha Gobind and Kristo,

were also members of a joint family. These two families were apparently on terms of intimate friendship, and the story told is that certain alterations were being made in one of the rooms in the house of one of these two families and that the two complainants, Narsingh and Moni, were engaged in doing certain excavations, and on the 7th May last, it is alleged, Narsingh, one of the complainants, found in the course of his work a small earthenware vessel which was believed by Hari to contain treasure. The men at midday are said to have been kept from going to take their usual bath and refreshment, and later on in the day they were alleged to have been tortured by having crowbars, which had been heated, placed against various parts of their skin. One of them is said to have been incapacitated for a certain length of time. That, shortly, is the nature of the complaint. The medical evidence certainly shows that there were some marks upon these two complainants. But the difficulty on the medical evidence is, again, that it does not altogether corroborate the story of the witnesses whom the learned Judge has stated to be liars, because the medical evidence is that these injuries on the bodies of the two complainants had been caused not less than 72 hours before the time when the doctor saw them. As a matter of fact these injuries, if the story told is a true one, had been caused considerably less than 72 hours before they were seen by the doctor. Of course in an ordinary case one might not pay much attention to the opinion of a doctor on a matter like that. But when the direct evidence is disbelieved by the Judge, or rather when the witnesses who gave the direct evidence were disbelieved by the Judge, it is a matter of importance that the medical evidence tends further to throw doubt upon the story as told by the witnesses. The other witness who is said to corroborate in part

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the story told by the complainant, is the wife of Moni Kamali. She again was believed not to be a truthful witness by the learned Judge. Personally I do not remember ever having seen a man convicted on evidence of the nature of what the learned Judge describes as that of liars without any corroboration at all. It seems to me a dangerous precedent to convict a man on evidence of people who were found to be untruthful without any corroboration. I think, under the circumstances, the case is much too doubtful for us to support the conviction passed solely on evidence of this nature, and we ought to allow the appeal of the accused and set aside the conviction and sentence passed upon him.

BEACHCROFT J. I agree that the conviction based on the evidence of persons, the greater part of whose evidence has been found to be false by the learned Judge, cannot be sustained, especially in view of the great delay in lodging information, a delay for which no adequate explanation had been given.

E. H. M. *Appeal allowed.*

CRIMINAL REFERENCE.

Before Fletcher and Beachcroft JJ.

EMPEROR

v.

BABAR ALI GAZI.*

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Oct. 14.

Reference—Jury Trials—Power of Judge to refer the case of an accused as to whom he agrees with the verdict—Legality of procedure—Criminal Procedure Code (Act V of 1898) s. 307 (2)—Confessions of co-accused —Corroboration—Sufficiency of circumstances raising a mere suspicion.

Section 307(2) of the Criminal Procedure Code contemplates a reference only in the case of those accused as to whom the Judge declines to accept the verdict of the Jury. When he agrees with them in respect of any particular accused he ought to acquit or convict and sentence the latter as the case may be.

Confessions of the co-accused can be taken into consideration, but the Court requires corroboration before acting on them.

THE accused No. 1, Babar Ali Gazi, and five others were tried before the Sessions Judge of Jessore and a Jury, on a charge of dacoity with murder under s. 396 of the Penal Code. The facts of the case were as follows. Sona Bibi, a widow, lived by herself in a hut in the village of Saikhpura, in the district of Jessore. The accused, Messer Sheikh, an agnatic cousin of hers, used to cultivate her lands at produce rent. It was alleged that she had latterly tried to let out a portion of her land to others, and that her relations with Messer had, in consequence, become strained. On the night of 28th April 1914, the six accused were

* Criminal Reference, No. 26 of 1914, by P. K. Chatterjee, Sessions Judge of Jessore, dated Aug. 17, 1914.

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said to have broken into her hut, strangled her to death, and carried away some moveables. A skeleton alleged to have been that of the deceased woman was found in the river on the 1st May. The accused No. 4, Pyar Molla, was arrested on the 2nd May and confessed before the Magistrate on the 4th, but retracted the confession on the 15th of June on examination before the Committing Magistrate. Babar Ali also made a confession, which he adhered to before the committing officer, but which he retracted at the sessions trial.

The Jury returned a unanimous verdict of guilty under s. 396 of the Penal Code against the accused Nos. 3 and 6, Messer Sheikh and Seyamuddi Shana and under s. 395 against the others. The Judge accepted the verdict as to Babar Ali, but was of opinion that the others should be acquitted. He however, referred the whole case, including that of Babar Ali, to the High Court under s. 307 of the Criminal Procedure Code.

Babu Hira Lal Sanyal, for the accused.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown.

Cur. adv. vult.

FLETCHER J. This case comes before us on a reference made by the Sessions Judge of Jessore under the provisions of section 307 of the Code of Criminal Procedure. The accused were tried before the learned Sessions Judge and a Jury on a charge of dacoity with murder under section 396 of the Indian Penal Code.

The Jury by a unanimous verdict found the accused Nos. 3 and 6 guilty of an offence under section 396 of the Indian Penal Code, and the other four accused guilty of an offence under section 395 of the Indian Penal Code.

The learned Sessions Judge agreed with the verdict as against the accused No. 1 Babar Ali, but failed to pass sentence on him, being of opinion that, as he disagreed with the verdict as regards the other accused, he was bound to refer the whole case to this Court. The learned Judge, however, was in error in the view that he took and it was clearly his duty to pass sentence on the accused No. 1 Babar Ali. As against the accused No. 1 Babar Ali the case must go back to the learned Judge for him to pass sentence on this accused. The charge against all the accused under section 396 of the Indian Penal Code had reference to the dacoity perpetrated in the house of one Sona Bibi, a widow, when it is alleged that she was murdered. The skeleton that was subsequently found may not have been that of Sona Bibi. The evidence, however, leaves no doubt that a dacoity took place in the house of Sona Bibi, and her disappearance amply supports the charge of murder.

The view that seems to have commended itself to the learned Judge that, as a period of seven years had not elapsed since the disappearance of Sona Bibi, the Court could not presume her death, is fallacious.

There was in the present case evidence before the Court from which the Court could infer that Sona Bibi had been murdered on the night in question, and it is not necessary to rely on the presumption mentioned by the learned Judge. As I have already stated the learned Judge agrees with the verdict of the jury as against Babar Ali. He was a confessing prisoner, and the learned Judge believed the confession to be true. The accused No. 4 was also a confessing prisoner. But the learned Judge did not believe his confession to be "quite voluntary," and he further states in the letter of reference that the accused No. 4 retracted his confession at the first opportunity

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before the Committing Magistrate on the 15th of June. There is no reason to think the learned Judge is correct in his first assumption; his second is incorrect. I see no reason to differentiate between the confessions made by Babar Ali and the accused No. 4, Pyar Molla. I think, therefore, that we ought to convict the accused No. 4, Pyar Molla, of an offence under section 396 of the Indian Penal Code and sentence him to transportation for life. As against the remaining four accused, the confessions can be taken into consideration, but the Court requires corroboration before it will act upon the confessions of co-accused. The corroboration in the evidence in this case, although it raises a case of suspicion, falls far short of what is required to support a conviction. It consists principally of statements of witnesses as to seeing the accused or some of them together on the night of the occurrence, and as against one of the accused, as to the identification of certain ornaments found with one of the accused which had sometime or other been pledged with the deceased woman. These statements, though giving rise to suspicion, are consistent with the innocence of these four accused.

I, therefore, think that we ought to accept the reference made by the learned Judge as regards the accused No. 2 Jamadar Mandal, the accused No. 3 Meser Sheikh, the accused No. 5 Panchu Shana, and the accused No. 6 Seyamuddi Shana, and that they ought to be acquitted.

BEACHCROFT J. I agree. Sub-section (*2*) of section 307 of the Code of Criminal Procedure does not intend, as the learned Judge seems to think, that when the Judge is not prepared to accept the verdict of the Jury in its entirety the whole case is to be referred to this Court. It only contemplates a

reference in the case of those persons in respect of whom the Judge declines to accept the verdict. When the Judge agrees with the Jury in respect of any particular accused, the Judge ought to convict and sentence, or acquit that accused as the case may be.

E. H. M.

CRIMINAL REVISION.

Before Jenkins C.J., and Teunon J.

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v.

EMPEROR.*

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Nov. 20.

Revision—Extradition warrant issued by Resident in Nepal—Proceedings thereon by District Magistrate in British India, and order of surrender of fugitive—Power of High Court to interfere in revision, with such order—Nepal, whether a "Foreign State"—Criminal Procedure Code (Act V of 1898) ss. 435, 439, 491—Extradition Act (XV of 1903) ss. 7, 15.

Nepal is not a "Foreign State" within the meaning of the Indian Extradition Act (XV of 1903).

Where a warrant has been issued by the Political Agent, under s. 7 of the Act, its execution by the District Magistrate in British India, in accordance with the Act, is an executive act, and the High Court cannot interfere in revision with the proceedings of the Magistrate and the order to surrender the fugitive criminal, but if the latter considers himself aggrieved thereby, he can invoke the action of the Government under s. 15.

The power of the High Court, however, to interfere under s. 491 of the Criminal Procedure Code, which applies whatever be the occasion of the deprivation of the liberty of the subject, remains untouched by the Extradition Act.

* Criminal Revision No. 1701 of 1914, against the order of A. H. Vernede, District Magistrate of Darbhanga, dated July 19, 1914.

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THE preliminary facts of the case are set forth in *Gulli Sahu* v. *Emperor* (1).

After the order of the High Court discharging the petitioner he was released. It appeared that, on the 24th June 1913, the Resident in Nepal issued a warrant addressed to the District Magistrate of Darbhanga, apparently under s. 7 of the Extradition Act, for the arrest of the petitioner, who was described as a Nepalese subject, and for his delivery to an officer of the State of Nepal, and forwarded evidence of his nationality and criminality. On the 5th July 1914, Mr. Slater, the Subdivisional Officer of Madhubani, issued a warrant against the petitioner who was arrested and placed, the next day, before the Magistrate in charge at Darbhanga to whom he applied for copies of the warrant and other papers in the case, claiming to be a British Indian subject. On the 9th instant the District Magistrate directed him to quote the law he relied on and to produce his evidence, presumably on the 19th. After hearing arguments on his behalf the District Magistrate passed the following order :—

"The petitioner, Gulli Sahu, has been arrested in this district in execution of a warrant issued by the Resident in Nepal under section 7 of the Indian Extradition Act and dated 24th June 1913. The Resident describes him as a Nepalese subject accused of murder and has sent evidence of nationality and criminality in support of the warrant.

The petitioner protests against his surrender to Nepal on 4 grounds.

(*i*) That the evidence against him, even if accepted, does not establish a charge of murder or other extraditable offence against him.

The evidence against him goes to show that he and several others in cold blood assaulted one Peari Goala, and that Peari Goala died 7 days later in consequence of the assault. It is urged that this evidence, even if believed, would not make the case one of murder in the first degree within the meaning of section 302, Indian Penal Code, and that lesser degrees of murder so to speak are not contemplated by Article IV of the Treaty of 1855 and are not extraditable offences. I do not consider it my businesss to find whether the facts deposed to would constitute an offence under

(1) (1913) I. L. R. 41 Calc. 400.

section 302 of the Indian Penal Code or not. The Nepal authorities evidently take a serious view of the affair, as I gather that one of the assailants has been sentenced to death and another to transportation for life on the same evidence. I do not, however, consider it my business to find as to the meaning of "murder" in Article IV of the Treaty. It seems to me that the word "murder" must be construed in the wide sense to mean "killing" covering murder in lesser degrees . . . . . .

(*ii*) That the evidence against him is not worthy of belief. It is pointed out that no complaint was lodged till 9 months after Peari's death, and that the evidence is conflicting, some witnesses attributing Peari's death to asthma. I do not consider it my business to find on the question of the credibility of the witnesses, but I may say that my *prima facie* impression is that the case is a true one, and that enormous efforts have been made by the accused persons to suppress it extending even to bribing the deceased's widow.

In speaking about "the evidence" above I have considered both the evidence forwarded from Nepal and the evidence subsequently recorded by the Subdivisional Officer of Madhubani . . . . . .

(*iii*) That he is a British subject and not a Nepalese subject. The Nepal evidence proves that he was born at Khungarch in Nepal and is a Nepalese subject. This I accept as *prima facie* true. The so called rebutting evidence produced by the petitioner seems to me unworthy of credit.

(*iv*) That the warrant is issued by "the Resident" in Nepal, whereas section 7 of the Extradition Act speaks of the Political Agent. The warrant is, therefore, invalid. I do not consider it necessary to seriously discuss this argument.

It seems to me that *prima facie* the petitioner is a Nepalese subject who is charged with an extraditable offence and has been arrested on a warrant duly issued under section 7 of the Extradition Act, and that to pick holes in words or go behind the Nepal evidence and refuse to surrender the petitioner would be improper, and would rightly be regarded as an unfriendly act by the Nepal authorities. I, therefore, direct his surrender. As proved by the petitioner I further direct that this order be kept in abeyance for 15 days to allow of his moving the Local Government against it under section 15 of the Extradition Act."

The petitioner then moved the Sessions Judge of Darbhanga to refer the case to the High Court but the latter refused to do so, by his order dated the 8th September 1914, on the ground of want of jurisdiction, the warrant not having been shown to be plainly

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illegal. He, thereupon, obtained the present Rule from the High Court.

Mr. Chakravarti (with him *Mr. K. N. Chaudhuri* and *Babu Rajendra Persad*), for the petitioner. Nepal is not a "Foreign State" (*vide* letter from Under-Secretary, Foreign Department). The Government of India say that extradition of fugitive criminals from Nepal is governed by the Treaties of 1855, 1866; and Chapter III of the Act (XV of 1903) applies to the case subject to the Treaties. The offence in this case is not murder but culpable homicide or grievous hurt and is not extraditable under Article 4 of the Treaty of 1855. The warrant issued by the Political Agent under section 7 must be with respect to an extraditable offence otherwise it is plainly illegal. The Magistrate must satisfy himself when he receives such warrant, that it is in respect of such an offence. [Refers to *Gulli Sahu* v. *Emperor* (1)].

[JENKINS C.J. Can we interfere in such matters at all?]

Mr. Chakravarti. Yes, this Court can interfere and has interfered: see *Gulli Sahu* v. *Emperor* (1), *Emperor* v. *Huseinally Niazally* (2).

Section 15 does not oust the jurisdiction of the High Court if the warrant is on the face of it illegal: see *Queen* v. *Wilson* (3).

The Deputy Legal Remembrancer (*Mr. S. Ahmed*), for the Crown. We contend that this Court has no jurisdiction to interfere with the order of the Magistrate. The Magistrate, when he receives a warrant from a Political Agent, is bound to act in pursuance of the warrant, and has, as an executive officer, simply to execute the warrant. He cannot go behind the warrant and enquire whether the warrant is legal or

(1) (1913) I. L. R. 41 Calc. 400. (2) (1905) 7 Bom. L. R. 463, 467.
(3) (1877) 3 Q. B. D. 42.

otherwise. His order under this section is an executive order.

The only remedy against the warrant of the Political Agent or the order of the Magistrate is by an appeal to the Government of India or the Local Government. The High Court in England cannot interfere with an order of this character passed by the Chief Magistrate at Bow Street [see *Queen* v. *Wilson* (1), *Queen* v. *Maurer* (2)] but may interfere on a writ of *habeas corpus* and not otherwise.

The High Court here may interfere under section 491, Criminal Procedure Code, whether proceedings are under Chapter II or III of the Act: *In the matter of Rudolf Stallmann* (3) at pp. 183, 184, 197, 199.

Section 15 of the Charter also does not apply: see *Rudolf Stallmann* v. *Emperor* (4), *In re Mohunt Deva Dass* (5).

The High Court did interfere in this very case, *Gulli Sahu* v. *Emperor* (6), because there was no warrant at all from the Political Agent, so that there was no authority for the Magistrate to arrest the accused. The case of *Emperor* v. *Huseinally Niazally* (7) is distinguishable. The Treaty of 1855 has no application to this case as no requisition was made by the Nepal Government but a warrant issued by the Political Agent.

The requirements of s. 7 of the Act have been complied with. The warrant was issued by the Resident in Nepal who is the Political Agent under s. 3 (*40*) of the General Clauses Act (X of 1897), and the offences disclosed by the evidence amount at least to culpable homicide or grievous hurt, which are

(1) (1877) 3 Q. B. D. 42.
(2) (1883) 10 Q. B. D. 513.
(3) (1911) I. L. R. 39 Calc. 164.
(4) (1911) I. L. R. 38 Calc. 547.
(5) (1898) I. L. R. 38 Calc. 550 n.
(6) (1913) I. L. R. 41 Calc. 400.
(7) (1905) 7 Bom. L. R. 463.

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extraditable under Sch. III of the Indian Extradition Act.

JENKINS C.J. AND TEUNON J. The applicant, Gulli Sahu, has obtained a Rule calling in question the legality of his arrest under the Indian Extradition Act of 1903. The Rule was granted with some hesitation for great doubt was felt as to the Court's jurisdiction to interfere in the exercise of its revisional powers. This doubt was well-founded. The powers of the Act were set in motion by the Political Agent in and for the State of Nepal who issued a warrant addressed to the District Magistrate of Darbhanga for the arrest of the applicant Gulli Sahu, and his delivery as in the warrant described.

The applicant is a Nepalese subject who had fled from Nepal to British territory. The case against him is that he has committed, or is supposed to have committed, murder and that is an extradition offence. The proceedings thus fell within section 7 of the Act. Subsection (*1*) empowers a Political Agent to issue a warrant addressed to a District Magistrate for the arrest of a person by whom an offence has been committed, or is supposed to have been committed. Subsection (*2*) provides that the warrant so issued shall be executed in the manner provided by the law for the time being in force with reference to the execution of warrants.

It has not been suggested that we should or could revise what was done by the Political Agent; but we have been asked to interfere with the proceedings of the District Magistrate in British India. But the District Magistrate's sole function was to execute the warrant and, notwithstanding his eccentric procedure and pronouncement, this in effect is what he has done. And as in so doing he performed in accordance with

his legal duty an executive act, we have no power to interfere in the exercise of our revisional powers. That this is the true effect of the Indian Extradition Act, 1903, is we think apparent from an examination of its scheme. Chapter II of the Act deals with the surrender of fugitive criminals in the case of Foreign States, and where a requisition is made for such surrender, the Government may issue an order to a Magistrate to enquire into the crime. The method of inquiry is described, and a power to commit the fugitive criminal to prison to await the orders of the Government, or to release him on bail, is vested in the Magistrate.

Then it is enacted that the Magistrate shall report the result of his inquiry to the Government, and a power is given to the Government to refer to the High Court any important question of law. But it rests with the Government to decide as to the surrender of the fugitive criminal, and section 5 empowers the Government to stay proceedings under the Chapter and to direct any warrant issued under it to be cancelled, and the person for whose arrest a warrant has been issued to be discharged.

Chapter III, on the other hand, deals with the surrender of fugitive criminals in case of States other than Foreign States. Nepal is such a State, so that it is with this Chapter that we are concerned. In cases falling under this Chapter a simpler procedure is prescribed where proceedings are initiated by a Political Agent. In that case no enquiry is directed and the determination of the Political Agent is regarded as sufficient subject to the Government's power of interference under section 15.

Where, however, a State not being a Foreign State, itself makes a requisition for the surrender of an accused person then the procedure of section 3, which

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is in Chapter II, is prescribed including the enquiry and report by the Magistrate. An examination of the whole Act and a comparison of its provisions confirm the view that, where a warrant is issued by a Political Agent under section 7, its execution by the District Magistrate in accordance with the Act is an executive act, and the Court cannot interfere in revision with such execution. There is nothing in this view which in any way conflicts with the power of the Court to interfere otherwise than by way of revision. Thus the power of the Court to interfere under section 491 is untouched by this decision, for that is a power not created by the Extradition Act or exercisable by way of revision, but vested in Presidency Courts to protect the liberty of the subject in appropriate cases, whatever may be the occasion of the deprivation of which complaint is made.

If a fugitive criminal arrested under section 7 of the Indian Extradition Act considers himself aggrieved, he can invoke the action of the Government under section 15. This Court, however, has no power of revision and so the Rule must be discharged.

E. H. M. *Rule discharged.*

PRIVY COUNCIL.

MAHOMED MUSA

v.

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*P.C.** 1914

Oct. 22, 23 ; *Nov.* 25.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Compromise—Compromise of suit relating to mortgages—Agreement of compromise not registered and not incorporated in decree—Suit for redemption of mortgages—Agreement for extinction of equity of redemption and for division of properties amongst the parties to mortgage deeds—Agreement of compromise given effect and carried out by acts and conduct of parties though document is ineffective to prove contract —Principle that Court will uphold a contract carried into effect by acts and conduct of parties.

In this case the Judicial Committee (affirming the decision of the High Court) *held*, in a suit for the redemption of two mortgages executed in 1848 and 1871 respectively between the predecessors in title of the parties, that the equity of redemption had under the circumstances been extinguished.

In 1870 an agreement was come to by the then representatives of the mortgagor and mortgagee in reference to the mortgage of 1848. Sums were fixed as being the principal and the interest due, and arrangements were made for payment by yearly instalments, and for the management of the property. In 1873 differences arose between the parties to that agreement, and the mortgagee brought a suit to enforce it which was compromised, the terms of the agreement being in effect to pay off the mortgage debts and to divide the properties into specific shares which were to be legally conveyed by the mortgagor to the parties respectively entitled to them, and a decree was made by the Court that "the suit be decided in pursuance of the terms of the compromise, and the suit be struck off from the list of cases." No conveyances were executed by the mortgagor in completion of the contract to that effect in the compromise, nor was the agreement of compromise registered nor its terms incorporated into the decree : but it was acted upon and carried out by all the parties to it, and

**Present* : LORD DUNEDIN, LORD SHAW, SIR JOHN EDGE AND MR. AMEER ALI

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by their successors in title, and for a period of 30 or 40 years prior to the present suit the rights of all the parties had been dealt with upon the same footing as if the mortgagor had made an express conveyance parting with the equity of redemption, and transferring allotted shares of the property itself to the mortgagees, and reserving one share for herself.

Held, that if the agreement of compromise was defective as not being registered, the decree had been obtained only on one footing, namely that the parties to the suit had in fact arranged their rights in the property in terms of the compromise. And even though the compromise and the decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption, the acts of the parties had been such as to supply all defects. When the actings and conduct of the parties are founded upon, as in the performance or part-performance of an agreement, the *locus penitentiæ*, which exists in a situation where the parties stand upon nothing but an engagement which is not final or complete, is excluded. For equity will support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon.

The principles laid down in *Maddison* v. *Alderson* (1), Bell's Commentaries, 10th Ed., section 26, and *Potter* v. *Potter* (2) followed.

There was nothing in the laws of India inconsistent with these principles; on the contrary those laws followed the same rule.

APPEAL No. 10 of 1912 from a judgment and decree (16th June 1909) of the High Court at Calcutta which reversed a judgment and decree (31st August 1908) of the Court of the Subordinate Judge of the 24-Parganas.

The plaintiffs were appellants to His Majesty in Council.

The main question for determination on this appeal was whether the appellants were entitled to redeem two mortgages dated 22nd July 1848 and 4th April 1871.

By the mortgage deed of 22nd July 1848 one Fazlul Karim mortgaged his zamindari, Pargana Amirpur Balanda, Touzi No. 586 and Mouzahs Ranigachee and Goburdhunpur, Touzi No. 1161 in the 24-Parganas, to one Ram Chund Mukerji to secure a loan of

(1) (1883) L. R. 8 A. C. 467, 475. (2) (1750) 1 Ves. Sen. 437, 441.

Rs. 1,40,000 with interest at 12 per cent. per annum; and these were the properties it was sought to redeem in the present suit.

On 20th September 1850 Fazlul Karim by a bill of sale conveyed the zamindari above mentioned to his wife Khodajannessa Begum as a gift in lieu of dower.

On 14th February 1851 Khodajannessa Begum filed a suit in the supreme Court at Calcutta against Ram Chund Mukerji and Fazlul Karim for redemption of all the mortgaged properties. In that suit a decree was made by consent of the parties on 18th February 1851 by which it was found that Rs. 1,37,500 was due on the mortgage for principal and Rs. 1,063-6-4 for interest up to the date of suit, and subsequent interest was allowed at 12 per cent.; and it was ordered that on the plaintiff paying to Ram Chund Mukerji what was due for principal, interest and costs by yearly instalments of Rs. 24,000, Ram Chund Mukerji should convey the mortgaged properties to her. In case of default in payment of any instalment the decree provided (as an ordinary redemption decree) for an account, for payment by the plaintiff within six months, and in default of payment for dismissal of the suit. The decree further provided that Fazlul Karim should repay to the plaintiff what she might pay and get from her a reconveyance of such of the mortgaged property as was not included in the bill of sale, and in default of such payment by him he should be absolutely debarred and foreclosed of the equity of redemption in the mortgaged properties.

On 16th August 1853 Khodajannessa Begum granted a patni lease of her zamindari, Touzis Nos. 586 and 1161, to one Prannath Rai Chowdhuri: the rent reserved was Rs. 35,400 per annum of which Rs. 19,888-10-5 was payable for Government revenue leaving Rs. 15,511-5-15 malikana for the lessor.

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On 20th May 1856 Fazlul Karim died leaving his widow, Khodajannessa Begum, his three sons Mahomed Ahya, Mahomed Musa and Mahomed Jackeria, and his two daughters, Nurunnissa Bibi and Jebannissa Bibi, him surviving. These heirs and legal representatives were substituted as defendants for him in the suit in the supreme Court.

On 2nd December 1857 the decree of 18th February was varied by consent of parties, the rate of interest being reduced to 8 per cent., and the yearly instalments to Rs. 13,000.

On 1st October 1862, Ram Chund Mukerji died leaving three sons, Panchanan Mukerji, Ram Lal Mukerji and the first defendant Sashi Bhusan Mukerji, him surviving. He left a will of which his sons, as the executors, obtained probate, and by which his rights under the mortgage were devised to them.

On 24th April 1863 the master of the Supreme Court reported that the reference to him under the decree of 18th February 1851, had not been proceeded with, that nothing had been done in the suit since the filing of the decree in his office on 17th April 1851, and that the reference might be presumed to have been abandoned, or struck off for want of prosecution.

On 14th November 1870 Khodajannessa Begum and the three sons of Ram Chund Mukerji entered into an agreement, and Khodajannessa Begum executed a registered deed embodying it. By that deed the principal of the mortgage debt was fixed at Rs. 1,16,754-5-6, and the interest then due at Rs. 51,204-4. It was arranged that these sums should be paid off by yearly instalments of Rs. 12,000, and for that purpose Khodajannessa Begum was to appoint Panchanan Mukerji as her constituted attorney (which she did on the day of the execution of the deed) to collect the rent due under the patni lease, apply Rs. 12,000 out of it

in payment of the instalments, and pay the balance to Khodajannessa Begum.

On 4th April 1871 Khodajannessa Begum executed a second mortgage of all the properties included in the first mortgage of 22nd July 1848, in favour of Arun Prokash Ganguli, since deceased, the father of the first and second respondents to secure the repayment of Rs. 20,000 with interest at 8 per cent. per annum.

In April 1873 Khodajannessa Begum obstructed and prohibited payment of the patni rent to Panchanan Mukerji whereupon he and his brothers, Ram Lal Mukerji and Sashi Bhusan Mukerji, brought a suit (87 of 1873) against her in the Court of the Judge of the 24-Parganas to enforce the terms of the agreement of 14th November 1870. That suit was compromised: on 26th November 1873, Khodajannessa Begum executed and filed in Court a razinama stating the terms of the compromise, which was also signed and consented to by the plaintiffs in that suit.

By the razinama it was agreed that there was due to Arun Prokash Ganguli, in respect of the second mortgage and the further loans and advances made by him, the sum of Rs. 50,000, and to the plaintiffs in suit 87 of 1873, under the mortgage of 22nd July 1848, and the agreement of 14th November 1870, the sum of Rs. 1,50,000; that the plaintiffs and Arun Prokash Ganguli should release all the properties covered by the mortgages of 1848 and 1871 from the liability for those debts, and that the malikana of Rs. 15,511-5-15, and the rights in the properties covered by the patni lease should be dealt with and divided as follows, Khodajannessa Begum agreeing to execute deeds of absolute sale or transfer to give effect to the arrangement: (*a*) that a 3-annas 1-gunda, 3-karas, 2-kags, 5-tils share of the malikana should be transferred by

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Khodajannessa Begum to Arun Prokash Ganguli in full payment and satisfaction of his claim for the Rs. 50,000 due to him; (*b*) that a 9-annas, 5-gundas, 2-karas, 2-kags, 15-tils share thereof should be transferred by her to the plaintiffs in full payment of the Rs. 1,50,000 due to them; and (*c*) that the remaining 3-annas, 12-gundas, 1-kara, 3-kags share thereof should remain the property of Khodajannessa Begum, free from incumbrances.

That accordingly out of the annual patni rent of Rs. 35,400, a sum of Rs. 12,000 out of the malikana, and the proportionate liability for Government revenue, aggregating Rs. 27,386-7-10 formed the amount realisable by the plaintiffs and Arun Prokash Ganguli from the patnidar in respect of the shares assigned and transferred to them, and that the balance of Rs. 3,511-5-15 as the malikana, and Rs. 4,502-2-15 for Government revenue, aggregating Rs. 8,013-8-10 formed the share of Khodajannessa Begum, realisable by her from the patnidars.

It was further agreed that the power of attorney to Panchanan Mukerji should be cancelled, and that the plaintiffs and Arun Prokash Ganguli should get their names registered as proprietors in the Collectorate in respect of their shares. And by the razinama it was prayed that the Court would decide the suit declaring that the plaintiffs should get the amounts claimed to their satisfaction in the manner above-stated, and that each party should bear and pay his own costs of the suit.

On 26th November 1873 a decree was made in the suit (87 of 1873) ordering that it be decided in pursuance of the terms of the razinama, and the decree was signed and sealed on 6th December 1873.

The deeds of sale or transfer contemplated by the razinama and decree were not executed; but the

arrangement itself and the division of the property was given complete effect to, and were carried out by all the various parties.

In 1875 Khodajannessa applied for and obtained direct payment of her share of the malikana from the patnidar, who at that time was the Court of Wards, acting on behalf of the minor sons of Prannath Chowdhuri, who had died. On 2nd October 1875 she executed a mortgage in favour of one Mutty Lal Dhur creating a first charge on her share to secure repayment of Rs. 57,395 with interest. In that mortgage-deed she recited the arrangement stated above between herself and the previous mortgagees by the razinama and decree of November 1873.

In 1876 and 1877 the malikana was paid by the patnidar to each of the persons entitled to a share thereof.

On 29th January 1878 and 24th August 1878, the names of Panchanan Mukerji and his brothers and of Arun Prokash Ganguli were by order respectively registered in the Collectorate, in spite of the objections of Khodajannessa Begum, as proprietors of their shares; and Mutty Lal Dhur's name was also registered as the mortgagee of the share of Khodajannessa Begum.

On 11th January 1880 Panchanan Mukerji sold and transferred to Arun Prokash Ganguli the share of his brother, Ram Lal Mukerji, which he had purchased at an execution sale on 5th March 1877, which was confirmed by the Court on 7th April 1877. On 4th August 1880 Arun Prokash Ganguli's name was registered as the proprietor thereof.

On 12th September 1875 Sasbi Bhusan Mukerji mortgaged, and on 2nd September 1882 he sold to the third respondent Shyamaldhone Dutt (4th defendant) his share in the properties.

In a suit 66 of 1879 Sashi Bhusan Mukerji obtained

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a decree against Khodajannessa Begum, in execution of which he attached her share, brought it to sale, and purchased it himself. The certificate of sale is dated 7th October 1882.

On 14th September 1887 Khodajannessa executed a deed of gift of her share in favour of one Mirza Ahmed Ali Beg, the deed being attested by, amongst others, her sons. Ahmed Ali Beg died in 1904 leaving the defendants, Eshruk Bibi and Kochin Bibi, his widow and daughter, him surviving.

On 7th July 1890 Khodajannessa Begum died leaving her surviving her three sons, Mahomed Ahya, the plaintiff, Mahomed Muza, and Mahomed Jacheriah, and two daughters, Nurunnessa Bibi and Jibanessa Bibi.

On 1st June 1892 Panchanan Mukerji conveyed (*inter alia*) his share in the properties in suit to Arun Prokash Ganguli, and, on 2nd August 1892, the name of the latter was registered as the proprietor thereof.

On 8th January 1896 the heirs of Khodajannessa Begum executed a conveyance to one Mrs. Morgan of a moiety of the properties in suit, with a view to her instituting the present litigation.

On 12th October 1901 Arun Prokash Ganguli died leaving the first and second respondents, his sons and heirs, and appointing them executors of his will of which they obtained probate.

On 3rd October 1907 the heirs of Khodajannessa Begum conveyed a moiety of the properties in suit to the plaintiff-appellant, Abdul Aziz, in order that he might act as a champertor in this litigation.

On 2nd January 1908 the appellants, as the surviving heirs and legal representatives of Khodajannessa Begum, instituted the present suit against Sashi Bhusan Mukerji, Aghore Kumar Ganguli, Abani Nath Ganguli, and Shyamaldhone Dutt, who defended the

suit, and Eshruk Bibi and Kochin Bibi, heirs of Ahmed Ali Beg, *pro formâ* defendants, who did not appear.

The suit was for redemption of the mortgages of 22nd July 1848 and 4th April 1871, and the plaint prayed for an account; that if necessary it might be declared that the mortgage of 4th April 1871 was invalid and inoperative, and the deed of gift of 14th September 1877 was a *benami* transaction and conveyed no right to the donee; that the plaintiffs might be allowed to redeem the mortgaged properties and a decree passed against defendants 1, 2, 3 and 4 for any excess over the mortgage-debt that might have been realised by them, and that they might be directed to reconvey the mortgaged premises.

The main defence (and the only one material to this report) was made by defendants 2 and 3, and was that in suit 87 of 1873, which was instituted by Panchanan Mukerji and his brothers against Khoda jannessa Begum, the latter filed a compromise which was made a decree of Court on 6th December 1873, by which Khodajannessa Begum sold or conveyed her equity of redemption in respect of a 9 annas odd share in the properties in suit to Panchanan Mukerji and his two brothers, and in respect of a 3 annas odd share in the same properties to Arun Prokash Ganguli in full discharge of their respective mortgage-debts. The plea was in effect that the mortgages ceased to exist after the compromise.

The Subordinate Judge held that the terms of the razinama or compromise were not incorporated in, and could not be considered as a part of the decree made in suit 87 of 1873, and that not being registered or stamped, that document could not affect immoveable property; that the fact that the parties had acted on the agreement contained in the razinama did not affect the right to redeem, and that without

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a conveyance and reconveyance no proprietary title could or did pass to the properties in suit; and that the possession of the defendants and their predecessor in title had not been adverse, and the claim to redeem was not affected by limitation. The Subordinate Judge held therefore that the mortgage of 1848 varied by the agreement of 14th November 1870 was still subsisting, and that the plaintiffs were entitled to redemption both in regard to it and to the mortgage of 4th April 1871; and made a decree accordingly to that effect.

An appeal by the defendants 2, 3 and 4 was heard by the High Court (CHITTY and CARNDUFF JJ.) who held that the mortgages of 1848 and 1871 were extinguished by the agreement and compromise of 1873 upon which the suit 87 of 1873 was based, and that the right to redeem was therefore also extinguished. Owing to their decision on this point, the High Court thought it unnecessary to decide any other question. A decree was therefore made allowing the appeal, and dismissing the suit with costs.

On this appeal,

De Gruyther, *K.C.*, and *B. Dube*, for the appellants, contended that the document of compromise of 26th November 1873 was, being unregistered, not admissible in evidence, and so far as it related to the mortgaged properties in suit, it was of no effect to pass any title to them. Reference was made to *Pranal Anni* v. *Lakshmi Anni* (1) and *Gurdeo Singh* v. *Chandrika Singh* (2). The terms of the compromise were not incorporated into the decree. No transfers or conveyances were ever executed as contemplated by the compromise, and the title to the properties dealt with in

(1) (1899) I. L. R. 22 Mad. 508, 513; (2) (1907) I. L. R. 36 Calc. 193. L. R. 26 I. A. 101, 105.

it were not completed. The execution of the decree on the compromise was barred by lapse of time. The High Court wrongly held that oral evidence was admissible to prove that the equity of redemption in the properties in suit was released by Khodajannessa Begum. Section 92 proviso (*4*) of the Evidence Act (I of 1872) made it inadmissible for that purpose. There was, it was submitted, no evidence to show that Khodajannessa did anything to extinguish the mortgages in suit, or that she treated them as having been extinguished, the onus of proof of which lay on the respondents. Her acts would not give any title, and any conduct of hers, so long as it was not sufficient to release the equity of redemption, would not bar the right to redeem: *Khiarajmal* v. *Daim* (1).

Upjohn, K.C., and *A. M. Dunne*, for the 1st, 2nd and 4th respondents, contended that the right to redeem the properties in suit had been extinguished both by the acts of the parties and also by the decree of the Court in the litigation of 1873. Registration was not required for a document evidencing the fact that an agreement had been come to between Khodajannessa and the mortgagees. Before the Transfer of Property Act came into force in 1882 no writing was necessary to convey; and under section 18 of the Registration Act IX of 1871, which was the Act in force when the agreement of compromise was made, the registration of such an agreement was optional. The agreement of compromise was good evidence of what the parties had orally agreed to. [LORD DUNEDIN. On the assumption that the decree on the compromise does not avoid the necessity for registration, what is the effect in equity of the acts of the parties on the transaction?] The acts of the parties founded on and in accordance with the agreement of compromise

(1) (1904) I. L. R. 32 Calc. 296; L. R. 32 I. A. 23.

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would get rid of the defect caused by the absence of registration: *Maddison* v. *Alderson* (1) and *Rose* v. *Watson* (2). No conveyances were executed, but they were unnecessary, for the arrangement was carried out by the parties, and complete effect was given to it. [LORD DUNEDIN. Section 92 proviso (*4*) of the Evidence Act makes an oral agreement to rescind or modify a registered mortgage inadmissible in evidence.] The agreement of compromise did not modify or rescind the mortgages: it stated the terms on which the mortgages should be paid off, and the property pass to the mortgagors, and that arrangement was carried out, and the conduct and acts of Khodajannessa showed that she understood that the mortgage of 1848 was extinguished. All parties acted under the agreement; nothing was done that modified or rescinded the mortgage; and section 92 of the Evidence Act was not applicable. The agreement had been acted on ever since 1873.

De Gruyther, *K. C.*, called upon, said he had nothing to add.

The judgment of their Lordships was delivered by

Nov. 25. LORD SHAW. This is an appeal from a judgment and a decree of the High Court of Judicature at Fort William in Bengal, dated the 16th June 1909. That judgment was pronounced upon and reversed a judgment and decree of the Second Subordinate Judge of the 24-Parganas dated the 31st August 1908.

The object of the suit is for the redemption of two mortgages dated 22nd July 1848 and 4th April 1871. The defence which has been sustained is that the right to redeem was extinguished many years ago, in circumstances which will now be mentioned.

(1) (1883) L. R. 8 A. C. 467, 474, 475. (2) (1864) 10 H. L. C. 672.

Many of the facts of the case are comprised in a chapter which may be said to have definitely closed in the year 1873; and it is accordingly unnecessary to narrate them in detail. After the 1848 mortgage was granted by one Fazlul Karim, his wife Khodajannessa obtained from him a conveyance of her husband's zemindary as a gift in lieu of dower. This occurred in 1850. In 1851 she began proceedings for redemption of the mortgaged properties. Many and various legal steps took place in that decade, and from at least the year 1863 no record remains of any proceedings in the suit. It is admitted that no useful light can now be thrown upon that litigation,—which, in any view, appears never to have been determined.

In 1870 a certain agreement was executed by Khodajannessa Begum and three sons of one Ram Chund Mukerji in reference to the 1848 mortgage. A sum was fixed as the principal due and another sum as interest due, and arrangements were made for payment by yearly instalments and for management of the property and the like.

On 4th April 1871 the second mortgage was granted. In 1873 differences, however, arose between Khodajannessa and the mortgagees, and a suit was brought by Ram Chund Mukerji's three sons to enforce against the agreement come to. This suit was compromised. On 26th November 1873 Khodajannessa entered into a razinama, or agreement of compromise, which razinama was signed by the plaintiffs. What happened under it may be expressed in Khodajannessa's own words in evidence given by her in a litigation in 1875, and printed on the record. In that suit on 30th April she testified as follows:—

"The suit in the 24-Parganas Court was settled and a solenama executed by the three brothers, a deed of compromise, what is termed a razinama and safinama. On my agreeing to execute a conveyance of the 12 annas share to the three brothers, it was settled. The three brothers

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and myself all agreed and made the settlement. I spoke to all the three brothers on the subject of that settlement."

The razinama contains a full narrative of the transactions with the property mortgaged, and of the financial embarrassments which had occurred. It appeared, as was the fact, that after the death of the putnidar of the property the realisation of the rents had come under the charge of the Court of Wards. And the true point so far as the present litigation is concerned, of the razinama was this, that it was arranged that from the year 1874 onwards the realisation of malikhana profits should be as follows:— To the plaintiffs in that case and Arun Prokash Ganguli "the malikhana profits in respect of 12 annas, 7 gundas, 2 karas, 1 kag share and the Collectorate revenue both amounting to Rs. 27,386-7-10 as per account given above, and I shall realise the profits in respect of the remaining 3 annas, 12 gundas, 1 kara, 3 kags share and Collectorate revenue both amounting to Rs. 8,013-8-10 kist by kist according to the terms of the kabuliyat." The other parties named were to get their names registered in the Collectorate. These parties, it may be mentioned, had expressly "consented to such arrangement and released the said taluks and all the properties covered by the mortgage deed to me free from the liability for the debt."

It is impossible to read this razinama without concluding that the mortgage debts were to be thenceforward for ever extinguished, that the property itself was to be divided among the parties in specific shares, and that with regard to one share—set forth as 3 annas, 12 gundas, 1 kara and 3 kags—it was to become and be dealt with by Khodajannessa as her separate property disburdened of debt. The remainder of the 16 annas was also to be similarly and separately owned and enjoyed.

The concluding prayer of the razinama was :—

"That the Court may be pleased to decide the suit declaring that the plaintiffs shall get the amount claimed to their satisfaction in the manner stated above."

The razinama was accordingly produced to the Court, which pronounced upon it as follows :—

"It is, therefore, ordered that the suit be decided in pursuance of the terms of the razinama, and that the suit be struck off from the list of pending cases."

The point which is made against giving effect to this compromise is that a conveyance was not made by Khodajannessa in completion of the contract of purchase narrated in the razinama. This is true. But no written conveyance by the Law of India was at the date of that transaction necessary, the Transfer of Property Act not being passed until the year 1882.

But even if a transfer in writing had from a conveyancing point of view been omitted, or if some other formal defect had occurred, their Lordships are of opinion that this would have been unavailing to the appellants in the attempt made in the present suit to redeem the mortgages. For the points against opening up the transaction are manifold, and are in their Lordships' opinion conclusive. The compromise has been acted upon by all the parties to it, and by their successors in title from that date to this. The suit was dropped, the division of shares of the property was made, and it may be said generally that from its date until the date of Khodajannessa's death in the year 1890, and, indeed, from that date until the present time, the property has been managed upon the footing of that division, of the extinction of the mortgage debts, of the division of the disburdened proprietary interests in the shares set forth in the compromise, and of the receipt and enjoyment of rents and profits accordingly. The detail need not be given.

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As to Khodajannessa herself, her own view is set forth in her evidence as already given. A striking instance of her approbatory acting, or homologation, may be mentioned. In the same year, 1875, she executed a mortgage for her own 3 annas share, and in this deed she recites at length the whole transactions, the separation into shares and so forth.

Transactions of mortgage, sale, etc., have been also carried out by the other sharers with reference to their properties. And, in short, it may be said that for a period of between 30 and 40 years prior to the initiation of this suit the rights of all parties have been dealt with precisely upon the same footing as if Khodajannessa had made an express conveyance parting with the equity of redemption, and transferring allotted shares of the property itself to the mortgagees, and reserving one share to herself.

In these circumstances their Lordships are of opinion that the proposition that the equity of redemption still remains with the representatives of Khodajannessa cannot be maintained. Even if the razinama itself was insufficient, yet in their Lordships' view the decree of the Court, to the sufficiency of which an objection was taken in argument—was obtained upon one footing, and one footing alone, *i.e.*, that the parties to the suit had in fact arranged their rights in the property in terms of the compromise.

Their Lordships, in view of the argument strongly pressed upon them, think it right further to say that even although the razinama and the decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption, the actings of parties have been such as to supply all such defects. To use language common from very early times in Scotland, and highly

approved in the case of *Maddison* v. *Alderson* (1) in the House of Lords, it is no doubt true that there is a *locus penitentiæ*, that is, "a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite and has not yet been adhibited in an authentic shape." This is the situation where the parties stand upon nothing but an engagement which is not final or complete. But where the actings and conduct of parties are founded on, then in all such cases, to use the language of Professor Bell in his Principles* section 26, "*rei interventus* raises a personal exception, which excludes the plea of *locus penitentiæ*. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocably referable to the contract and productive of alteration of circumstances, loss or inconvenience, though not irretrievable."

Their Lordships do not think that there is anything either in the law of India or of England inconsistent with it, but, upon the contrary, that these laws follow the same rule. In a suit, said Lord Selborne in *Maddison* v. *Alderson*(1) founded on such part performance (and the part performance referred to was that of a parol contract concerning land) the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. The Lord Chancellor then enumerates a series of acts

(1) (1883) L. R. 8 A. C. 467, 475, 476. * 10th Ed.

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referable to the parol contract, and he adds, "the matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded." Many authorities are cited in support of these propositions from English and Scotch law, and no countenance is given to the proposition that equity will fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. From these authorities one dictum quoted by Lord Selborne from Sir John Strange in *Potter* v. *Potter* (1) may be here repeated: "if confessed, or in part carried into execution, it will be binding on the parties, and carried into further execution as such in equity." Their Lordships do not think that the law of India is inconsistent with these principles. On the contrary it follows them.

A review by their Lordships of the judgment of the learned Judges of the High Court of the case has convinced them that the facts have been correctly appreciated, and they concur with the legal result arrived at.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the first three respondents: *Burton, Yeates & Hart.*

J. V. W.

(1) (1750) 1 Ves. Sen. 437, 441.

APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C.J., and Woodroffe J.

D. N. GHOSE & BROS.

v.

POPAT NARAIN BROS.*

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Jan. 28.

Practice—Reference—Assessment of damages.

A reference should be directed by the Court to assess damages only when the enquiry would involve questions of detail which it would be wasting the time of the Court to investigate.

Wallis v. *Sayers* (1) referred to.

APPEAL by the defendants, D. N. Ghose & Brothers, from the judgment of CHITTY J. on exceptions to the report of the Assistant Referee.

On the 28th May 1912 the plaintiffs, Popat Narain Brothers, instituted a suit against the defendants D. N. Ghose & Bros. being suit No. 537 of 1912 for the recovery of Rs. 7,776-9-6 as damages for non-delivery of coal which the plaintiffs bought from the defendants under five several contracts, namely (i) Contract No. 90 dated the 7th October 1911 by which the defendants sold to the plaintiffs 900 tons of Lodna rubble at Re. 1-12 per ton, (ii) Contract No. 91 dated 7th October 1911 by which the defendants sold to the plaintiffs 1,500 tons of Hemtodih rubble at Re. 1-8 per ton, (iii) Contract No. 122 dated 30th November 1911 by which the defendants sold to the plaintiffs 200 tons of Gajalidund B. B. rubble at Re. 1-12 per ton, (iv) Contract No. 124 dated the 1st December 1911 by which the defendants sold to the plaintiffs 100 tons of Ghusick B. B. rubble at Rs. 2-4 per ton, and (v) Contract made on the 16th February 1912 by which the defendants sold to the

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(1) (1890) 6 T. L. R. 356.

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plaintiffs 2,000 tons of Dhurmobund steam coal and 2,000 tons of Tituria steam coal at Rs. 3-11 per ton. It was alleged by the plaintiffs that the following quantities remained undelivered under the several contracts, namely under contract No. 90, 616 tons 11 cwt., under contract No. 91, 737 tons 12 cwt., under Contract No. 124, 84 tons 3 cwt., and the whole quantity under Contract No. 122 and the contract of the 16th February 1912.

A decree was made with the consent of the parties on the 28th November 1912, on the following terms. "The defendant firm undertakes to deliver the balance of coal remaining undelivered under the first four contracts except the portion relating to Hemtodih coal in respect of which the defendant firm undertakes to make up the Hemtodih contract by delivering Tituria coal. As to the contract of the 16th February that is to be satisfied by delivering to the plaintiff firm 1,000 tons each of Dharmabad and Tituria coal. . . . . The terms of the payment of the price of the coal under the first four contracts will be in accordance with the terms on the contracts. The payment of the price of the 2,000 tons under the contract dated the 17th February is to be on the same terms. The plaintiff firm to send despatching instructions at once and to be entitled to a *pro rata* share of the wagons sent. All deliveries must be completed by the 28th February 1913. . . . . The total amount of all the contracts so far as may be, is to be delivered by equal monthly instalments, that is $\frac{1}{3}$ in December next, $\frac{1}{3}$ in January next and $\frac{1}{3}$ in February next. Liberty to the defendant firm to give increased deliveries in any particular month. Each party to bear own costs of this suit."

The present suit was instituted by Popat Narain Bros. on the 13th February 1913.

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The plaintiffs alleged that in pursuance of the consent decree, they gave despatching instructions to the defendants for the total quantity of rubble and coal which the defendants had undertaken to deliver—that during December and January the defendants delivered only the following quantities of steam coal and rubble namely 216 tons 14 cwt. of Dharmabund and 390 tons 11 cwt. of Tituria steam coal, and 106 tons of Lodna rubble. On the 28th January 1913 the defendants wrongfully repudiated their obligation to deliver any further goods under the said decree, the reason being the rise in the market price for coal and rubble, and that by reason of such repudiation, and the non-delivery of the balance of the steam coal and rubble, the plaintiffs had suffered loss and damage amounting to Rs. 8,914-11 calculated on the basis of the market rates prevailing on the 28th January 1913. The plaintiffs alleged they were always ready and willing to take delivery of and pay for the goods as provided in the decree and that they gave proper instructions and made payments in terms of the decree.

Allowing credit for a particular bill for Rs. 158-3-9 the plaintiffs claimed from the defendants the sum of Rs. 8,755-7-3.

In their written statement the defendants denied that they wrongfully repudiated any obligation, or committed any breach of contract and relied on the defence that there was a shortage of wagons. They alleged that previous to the decree they had delivered under contract No. 90, 303 tons 4 cwt., and since the decree 217 tons 4 cwt. of Dharmabund steam coal, 390 tons 11 cwt. of Tituria steam coal and 124 tons 4 cwt. of Lodna rubble. They denied that the plaintiffs had suffered any loss or damage and submitted that in any event they could not be made

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liable for the entire amount of coal remaining undelivered on the basis of the difference between contract rates and the rate prevailing on the 28th January 1913. The defendants lastly denied that the plaintiffs were ready and willing to take delivery of the coal in terms of the decree.

The suit came on for hearing before FLETCHER J., and, on the 23rd April 1913, the following decree was made:—

"It is ordered and decreed that the further hearing of this suit be adjourned and that it be referred to the Assistant Referee of this Court to enquire and report what was the amount of damages suffered by the plaintiff firm by reason of the repudiation on the 28th January 1913 by the defendant firm of the contract embodied in the consent decree of this Court made in suit No. 537 of 1912, and dated the 28th November 1912, such damages to be ascertained on the basis of the market rates on the 28th January 1913. . . . ."

The plaintiffs filed their statement of facts on the 18th July 1913, and the defendants their counter statement of facts on the 6th August 1913. After several adjournments the reference was entered upon on the 26th February 1914, and the report of the Assistant Referee was made on the 9th March 1914. Exceptions to the report were filed by the plaintiffs on the 23rd June 1914. The exceptions were heard by CHITTY J., and on the 7th July 1914 his Lordship pronounced the following judgment:—

"This matter comes before me on exception to the Assistant Referee's report. The plaintiffs are the excepting party but their Counsel has now given up all the exceptions, except one, that is, their objection to the Assistant Referee's finding in respect of a contract for Lodna rubble. In their Statement of Facts the defendants put the rate for Lodna rubble at Rs. 3-4 per ton. The plaintiffs called some evidence to show that it was much higher over Rs. 5 per ton. The Assistant Referee for good reasons found that that evidence was of no value, and did not prove any market rate. The defendants then called two witnesses, one Behari Lall Ganguly, from Messrs. Turner Morrison and Company and one Umesh Chunder Gupta from Messrs. Dibar and Roy. These witnesses proved sales to the defendants

and to Dibar and Roy by Messrs. Turner Morrison and Company at the Lodna Colliery in January 1913 at Re. 1-7 or 1-8 per ton. We may take it that the general rate of those sales was Re. 1-8. The plaintiff objects and I think, rightly objects that this is no evidence of a market rate for Lodna rubble, which could be taken into account for assessing the damages sustained by the plaintiffs. It is clear from Behari Lall's evidence that Messrs. Turner Morrison and Company gave preference in their sales of Lodna rubble to the defendants and Dibar and Roy. That being so, the rates at which those two firms could purchase at the pit's mouths from Turner Morrison and Company do not represent the rate at which the plaintiffs could procure similar coal in the open market. It is plain from Behari Lall's evidence that these two firms had the exclusive right of purchasing this coal from Messrs. Turner Morrison and Company. It was only, if there was any surplus left over, that it would be sold to outsiders. It is incorrect, therefore, to say that the price at which Lodna rubble was sold to the defendants and Messrs. Dibar and Roy represented the market price of that coal on that date. The defendants in their Statement of Facts admitted that the rate at which the plaintiffs could buy was Rs. 3-4, but their Counsel argued before the Assistant Referee that this was a mistake on their part, and he accordingly adduced the evidence above referred to to show that the market rate was lower. I have already said that the rate of Re. 1-8 at which sales were made to the defendants and Dibar and Roy does not represent the market rate in the sense of being the price obtainable in the open market. As to the defendants being bound by this admission, they may not be absolutely bound, but it is very cogent evidence against them. It appears to me all the more cogent because, when they made it, the defendants must have been well aware of the sales at Re. 1-8 to themselves and Dibar and Roy. They cannot escape from the fact. The plaintiffs are now willing to accept the rate of Rs. 3-4 admitted by the defendants. I order accordingly that this exception be allowed and the damages be assessed at the rate of Rs. 3-4 on the 492 tons 7 cwt. As the other exceptions have not been pressed I direct that each party do bear their own costs."

From this judgment the defendants appealed.

Mr. A. N. Chaudhuri and *Mr. B. K. Ghosh*, for the appellants.

Mr. B. L. Mitter and *Mr. Bhattacharjee*, for the respondents.

[For the purposes of this report the arguments of counsel are unnecessary.]

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JENKINS C.J. This is an appeal which arises out of a suit between a vendor and a purchaser of coal, and one which should have been disposed of at the trial both on the question of liability and on the question of damages. However, a reference was directed.

More than once this Bench has protested against a reference being directed in cases of this nature. I wish again to repeat the protest, and I do this in the language of the Court of Appeal in England, when Lord Justice Bowen expressed his desire to protest against the melancholy spectacle which the case before him presented. He said . . . . . "Cases ought only to be referred to other persons to assess the damages where the inquiry involved questions of detail which it would be wasting the time of the Court to investigate." The opinion so expressed by Lord Justice Bowen was shared by Lord Justice Cotton and Lord Justice Fry, the latter of whom said that "he had more than once expressed his fears lest the practice of directing enquiries should lead to two trials when one was sufficient. Sending an action to a referee might be necessary in some cases, but as a general rule his Lordship objected to the splitting up of the trial into two enquiries—*first*, as to the right, and, *secondly*, as to the amount of damages. This case might have been entirely disposed of by the Judge": *Wallis* v. *Sayers* (1). We share the opinion to which expression is given in *Wallis* v. *Sayers* (1), and this case amply illustrates the undesirability of a needless reference. I have described the nature of the suit. It was commenced a long time back there was a decree establishing the right in 1913, and we are now in 1915 dealing with an appeal on exceptions to the Referee's report as to the *quantum* of damages. I trust that cases of this kind will not be referred to

(1) (1890) 6 T. L. R 356.

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the Referee. It is not merely that this is an error of procedure, but where the question is one between a seller and a purchaser and the point in dispute may be *readiness and willingness to sell*, it is obviously of prime importance to know how the market has gone with reference to the contract price. In this case the matter went before the Referee. It did not take a very direct course, and I am not clear that the real points were properly appreciated, but the result has been that the plaintiff has failed to prove the amount of damages in respect of this particular coal, Lodna rubble, unless he can rely on an allegation in the defendant's Statement of Fact. But that allegation was made provisionally. The plaintiff never insisted upon it before the Referee as being a correct statement of the market rate, and it is obvious from the course which the case took before the Referee, that both parties gave the go-by to that statement and endeavoured to establish by evidence before him what the market rate was. The plaintiff has failed to prove that the market rate exceeded Rs. 1-12 annas. Therefore, I think Mr. Justice Chitty ought not to have interfered with the conclusion of the Referee.

This appeal is allowed, and the order of Mr. Justice Chitty is set aside with costs of this appeal and the exceptions before Mr. Justice Chitty.

WOODROFFE J. I agree.

Appeal allowed.

Attorneys for the appellants: *B. N. Basu & Co.*

Attorney for the respondents: *Rajani Mohan Chatterjee.*

J. C.

ORIGINAL CIVIL.

Before Chaudhuri J.

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Feb. 15.

KUNJA LAL BANERJI

v.

NARSAMBA DEBI.*

Damdupat, rule of—Mortgage between Hindus, whether the rule of Damdupat applies to—Transfer of Property Act (IV of 1882) s. 4—Contract Act (IX of 1872) s. 37.

There is nothing in the Transfer of Property Act (read with the Contract Act) to preclude the rule of Damdupat from applying to mortgages between Hindus.

Madhwa Sidhanta Onahini Nidhi v. *Venkataramanjulu Naidu* (1) not followed.

In the matter of Hari Lall Mullick (2), *Nanda Lal Roy* v. *Dhirendra Nath Chakravarti* (3), *Jeewanbai* v. *Manordas Lachmondas* (4), and *Sundarabai* v. *Jayavant* (5) referred to.

BY an agreement dated the 22nd September 1908 the first defendant, Narsamba Debi, with the knowledge and consent of the second defendant, her husband Gopal Chandar Setty, agreed to sell to the plaintiff the house and premises No. 62-1, Machua Bazar Street in the town of Calcutta for the sum of Rs. 17,000, and on the same day the plaintiff paid to Narsamba Debi the sum of Rs. 8,000 by way of earnest money, the sale to be completed within a year from the 22nd September 1908. It was also further agreed between the parties that if Narsamba Debi should repay the sum of Rs. 8,000 with interest at 12 per cent.

* Original Civil Suit No. 1039 of 1910.

(1) (1903) I. L. R. 26 Mad. 662.
(2) (1906) I. L. R. 33 Calc. 1269.
(3) (1913) I. L. R. 40 Calc. 710.
(4) (1910) I. L. R. 35 Bom. 199.
(5) (1899) I. L. R. 24 Bom. 114.

with quarterly rests within a month from the expiry of the time limited for the completion of the conveyance, the plaintiff should not be entitled to claim specific performance of the contract.

On the same date the first defendant with the knowledge and consent of the second defendant, her husband Gopal Chandar Setty, executed a mortgage of the house and premises No. 68-1, Machuabazar Street in the plaintiff's favour.

The defendant failed to repay the sum of Rs. 8,000 within the prescribed time or at all, and the plaintiff called upon her to execute a conveyance in his favour in terms of the agreement. A draft conveyance was duly prepared and approved by the first defendant's attorney, and was subsequently engrossed on the 9th September 1910 for the defendant Narsamba Debi's signature, but she refused to execute it.

The plaintiff filed a suit against the defendants Narsamba Debi and her husband, Gopal Chandar Setty, for specific performance of the contract.

The suit was heard on the 13th May 1913, when a decree was granted in the plaintiff's favor for the specific performance of the agreement. It was also ordered that the matter be referred to the Official Referee to take an account of the money that was paid to the defendant Narsamba Debi by the plaintiff from the date of the mortgage (22nd September 1908) up to the date of the Official Referee's report and also to take an account of the money due on the mortgage upon the basis that Rs. 8,000 should be taken as the amount of principal as upon an adjusted account, and interest thereon be calculated at the rate provided in the mortgage up to the date of the report.

By his report, dated the 28th July 1914, the Official Referee reported that there was due to the plaintiff on the 15th July 1914 upon the mortgage the sum of

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Rs. 8,000 for principal and Rs. 14,263 for interest calculated up to the 15th July 1914 with quarterly rests. He pointed out that the interest far exceeded the principal and disallowed the excess under the rule of Damdupat.

The plaintiff applied for further directions on the report.

Mr. C. C. Ghose, for the plaintiff, referred to the following cases in support of his contention that the rule of Damdupat was not applicable to mortgages governed by the Transfer of Property Act: *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu* (1) and *In re Hari Lall Mullick* (2).

The defendants did not appear.

Cur. adv. vult.

CHAUDHURI J. This matter arises upon a contention raised on behalf of the plaintiff that the rule of Damdupat does not apply to mortgages under the Transfer of Property Act. There was a reference for accounts upon a mortgage decree in this suit in the usual course. Accounts have been taken and the Official Referee has made his report disallowing interest exceeding the amount of principal applying the rule of Damdupat. It was contended before me on the strength of *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu* (1), that the rule of Damdupat does not apply. The question has not so far come up for decision in this Court. In *In the matter of Hari Lall Mullick* (2), the point was raised but not decided. It was held in that case that an order admitting a creditor's claim was tantamount to a decree, and as such put an end to the contractual relationship between the parties. The

(1) (1903) I. L. R. 26 Mad. 662. (2) (1906) I. L. R. 33 Calc. 1269.

very same principle has been acted upon in the case of *Nanda Lal Roy* v. *Dhirendra Nath Chakravarti* (1). In the Bombay case of *Jeewanbai* v. *Manordas Lachmondas* (2), the learned Judge held that the rule of Damdupat was applicable. I find, however, that in that case 26 Madras was not cited. The current of decisions in the Bombay Court has been that the rule of Damdupat does apply: see the case of *Sundarabai* v. *Jayavant Bhikaji Nadgowda* (3).

In this Court the uniform rule, so far as I know, has been to disallow as between Hindus interest larger than the amount of principal in making up a mortgage account. As a Court of first instance I am not prepared to follow, under the circumstances, the Madras case *of Madhwa Sidhanta* (4). It seems to me that in that case the learned Judges have overlooked the provision of section 4 of the Transfer of Property Act, taken with section 37 of the Contract Act. It is conceded in the Madras case that in the Contract Act provision has been made for the application of the rule of Damdupat. Section 4 of the Transfer of Property Act provides that the chapters and sections of that Act which relate to contracts shall be taken as part of the Contract Act. I, therefore, confirm the report made by the Referee and disallow the contention raised.

W. M. C.

Attorneys for the Plaintiffs: *B. N. Basu & Co.*
Attorney for the first Defendant: *P. N. Sen*
Attorney for the second defendant: *R. C. Hazra.*

(1) (1913) I. L. R. 40 Calc. 710.
(2) (1910) I. L. R. 35 Bom. 199, 203.
(3) (1899) I. L. R. 24 Bom. 114.
(4) (1903) I. L. R. 26 Mad. 662.

LETTERS PATENT APPEAL.

Before Jenkins C.J. and Woodroffe J.

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March 31.

AHID KHONDKAR

v.

MAHENDRA LAL DE.*

Review—Application for review on ground of discovery of new matter or evidence—Appeal—"Strict proof," meaning of—Civil Procedure Code (Act XIV of 1882) ss. 626 cl. (b), 629—Civil Procedure Code (Act V of 1908) O. XLVII, rr. 4 (2) (b), 7 (1) (b).

In section 626 of the Code of 1882 "strict proof" does not mean proof that convinces the Appellate Court, but that there must be legal proof adduced before the Court that has to deal originally with the question of granting a review.

The whole scheme of the Act recognises that with proper safeguards the Court of first instance is the proper Court to determine whether or not there should be a review, but that before a review is granted those safeguards must be observed.

Per JENKINS C.J. "Proof" ordinarily has one of two meanings; either the conviction of the judicial mind on a certain fact, or the means which may help towards arriving at that conviction: the use of the word "strict" points to the second of these two meanings; and "strict proof" means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence. It is formality that is prescribed and not the result that is described.

Per WOODROFFE J. Cl. (*b*) of sub-s. (*1*) of rule 7 of O. XLVII of the new Code does not refer to the weight or sufficiency of the evidence. If the legal formalities are observed it is no objection that the probative force of evidence legally taken appears to be different to the Appellate Court from what it appeared to the Court granting review.

"Strict proof" means proof according to the formalities of law. It does not refer to sufficiency of proof in securing a particular conviction.

Whether the proof is according to law or not is within the jurisdiction

* Letters Patent Appeal No. 26 of 1911, in Appeal from Appellate Decree No. 1181 of 1909.

of the Appellate Court to determine ; the question of sufficiency of evidence is for the Court admitting the review.

Gyanund Asram v. *Bepin Mohun Sen* (1), *Bhyrub Chunder Surmah Chowdhuri* v. *Madhub Chunder Surmah* (2), *Chunder Churn Auggrodany* v. *Loodunram Deb* (3), *Koleemooddeen Mundul* v. *Heerun Mundul* (4) referred to.

LETTERS Patent appeal by Ahid Khondkar and others, the principal defendants, from the judgment of N. R. Chatterjea J.

One Mahendra Lal De and others brought a suit for arrears of rent at the rate of Rs. 80 per annum in the first Court of the Munsif at Katwa against Ahid Khondkar and others. At the first trial the suit was decreed at that rate on 21st March 1907. The defendants then filed an application for review under section 623 of the Code of Civil Procedure on the ground that they could not file certain rent receipts when the case was taken up as they had forgotten that those documents had been filed in a previous suit and that they came to know of it from the cross-examination of one of the defendants in this suit. The learned Munsif admitted the application for review, holding that the petitioners (*i.e.*, the defendants) had sufficient cause for not producing the documents when the case was heard and that those documents were not within their knowledge after the exercise of due diligence, and could not be produced at the time. The learned Munsif forthwith reheard the case, and, on the 27th November 1907, decreed the suit at the rate admitted by the defendants, after setting aside the former decree. The plaintiffs on appeal to the Additional Subordinate Judge of Burdwan objected to the order admitting the review and also to the decree passed after the admission of the review. The lower

(1) (1895) I. L. R. 22 Calc. 734.
(2) (1873) 11 B. L. R. (F. B.) 423 : 20 W. R. 84.
(3) (1876) 25 W. R. 324.
(4) (1875) 24 W. R. 186.

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Appellate Court by its judgment, dated 4th March 1909, held that the order of the Court of first instance admitting the review was *ultra vires* as, in its opinion, the defendants had failed to prove their allegations, of which there was not, in consequence, any strict proof as required by section 626, and revived the decree of the 21st March 1907. The defendants then preferred a second appeal to the Hon'ble High Court, which was dismissed on the 3rd January 1911 by Mr Justice N. R. Chatterjea who was of opinion that the lower Appellate Court had power to decide whether the defendants had strictly proved their allegations. The defendants, thereupon, preferred this appeal under section 15 of the Letters Patent.

Babu Jnanendra Nath Sarkar, for the appellants. The Court of first instance gave the plaintiffs a decree in full against the defendants and then modified it after granting my application for review. On appeal by plaintiffs the lower Appellate Court restored the original decision after setting aside the order passed on review. I submit this is illegal.

[JENKINS C.J. Did the lower Appellate Court proceed on the merits ?]

Yes. In this Court Mr. Justice N. R. Chatterjea has upheld the action of the lower Appellate Court. But section 629 of the old Code of Civil Procedure allows an appeal only when the review is granted, one of the grounds being that it was granted in contravention of the provisions of section 626. According to Mr. Justice N. R. Chatterjea's decision there would be an appeal in every case of review on the ground that the allegations had not been strictly proved. [Reads ss. 624, 626 and 629 and comments thereon.] In the present case the court of first instance when granting the review has acted according to the provisions of

section 626, in that it was satisfied that there was strict proof of the allegations made in the application for review and this finding was no doubt arrived at upon the evidence produced into proof of the allegations. I submit that the Appellate Court could not enter into the sufficiency of the evidence and give a different judgment, upon the same evidence, as to the question whether there was strict proof of the allegations in the petition of review. The Court of first instance believed the evidence, the Appellate Court disbelieved the same evidence and in consequence thereof the Appellate Court thought that the trial Court acted without jurisdiction in admitting the review. I submit he is wholly wrong. Further, if the Appellate Court be allowed to interfere with the sufficiency of the reason, or weight of evidence, given or attached by the trial Court then the applicant in whose favour the decree after review was passed will be deprived of the right of appeal against the original decree. If the opinion of Mr. Justice N. R. Chatterjea, be upeld it will rather impede the administration of justice and work out injustice to the party benefited by the admission of the review, as he cannot file any appeal against the first decree superseded thereby; nor could he simultaneously with the prosecution of the review proceedings go on with an appeal against the decree prior to review; and if he could, and succeeds therein he has no need to go on with the appeal.

I therefore submit that the order passed on the application for review under this section is final, in both cases when the order rejects the application or admits the application after observing the formalities enumerated in section 626; and in the present case the Court admitting the review has not acted in contravention of the requisite formalities.

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[JENKINS C.J. Does section 588 contain any provisions for an appeal from an order granting a review?]

No. But cl. (*w*) of r. 1 of O. XLIII of the new Code does.

[WOODROFFE J. What is the meaning of "strict proof"?]

The legal evidence given before the Court in support of the allegations in the application for review: see *Bhyrub Chunder Surmah Chowdhuri* v. *Madhub Chunder Surmah* (1) and *Kessowji Issur* v. The *Great Indian Peninsula Railway Co.* (2) as to s. 629. Regarding the finding of the lower Appellate Court as to want of jurisdiction of the Court of first instance, see the decision of Jenkins C.J. and Mookerjee J. in the Letters Patent Appeal of *Sheikh Sadaruddin* v. *Sheikh Ekramuddin* (3). If the Court of first instance had no jurisdiction, the plaintiff instead of appealing to the lower Appellate Court, should have come direct to the High Court under section 115 of the Code.

Babu Siva Prasanna Bhattacharji, for the respondent. When there is an appeal provided by section 629, the Appellate Court has power to enter into the merits of the order or judgment granting the review, and has power to form any opinion or come to any conclusion as to whether there was strict proof of the allegations made in the application for review according to its own view. I submit that the ruling in *Bhyrub Chunder Surmah Chowdhuri* v. *Madhub Chunder Surmah*(1) is in my favour, because it directs that there should be an enquiry into and strict proof of the allegations. The Appellate Court is therefore

(1) (1873) 11 B. L. R. (F. B.) 423; 20 W. R. 84. (2) (1907) I. L. R. 31 Bom. 381; L. R. 34 I. A. 115.
(3) (1913) 18 C. W. N. 22, 24.

the proper Court to decide on appeal whether there was any such strict proof or not.

[JENKINS C.J. What is the meaning of the word "proof"?]

"Proof" means the evidence that induces the Court to form a conviction as to any matter.

The appellant was not called upon to reply.

JENKINS C.J. This is an appeal under the Letters Patent from a judgment of Mr. Justice Nalini Ranjan Chatterjea, before whom the case came by way of appeal from an appellate decree. The question that arises is as to the competence of an Appellate Court to question the propriety of a review granted by the Court of first instance, on the ground that the evidence in support of the application should not have been believed.

This suit is one for rent, and in the first instance it was decided adversely to the defendants' contention. The defendants as a result of what appeared in the course of the trial, became aware of some new and important matter or evidence, and as a result of that made an application to the Court of first instance for a review. The review was granted. It was granted because it appeared to the Court that there was strict proof of the allegation of the discovery of new and important matter or evidence not within the knowledge of the applicant and because that strict proof convinced the Court of first instance. The result was that the review having been granted, the case was re-heard and a decree passed favourable to the defendants. From that decree an appeal was preferred by the plaintiffs, who objected not only on the merits, but on the ground that the review should not have been granted. The lower Appellate Court has dealt with the second of these contentions and has held that the

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review was *ultra vires* or beyond the jurisdiction of the Court of first instance, so that the first decree was restored. The position of the defendants became this: that the decree in their favour was set aside and the first decree stood without their having any right to appeal therefrom. From this decree of the lower Appellate Court there was an appeal to this Court which was heard by Mr. Justice Nalini Ranjan Chatterjea to whom it appeared that the decision of the lower Appellate Court was correct: and it is in these circumstances that the matter now comes before us by way of appeal under the Letters Patent.

The propriety of the course adopted by the learned Judge of first instance in granting the application for review, is to be determined by reference to the provisions of the old Code, which are substantially reproduced, though with a slight variation in the present Code. Section 623 permits an application for a review of a judgment and provides that it may be made by any person considering himself aggrieved who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made desires to obtain a review of the decree passed or order made against him. It is only with that part of the section that we are now concerned. Section 624 provides that "except upon the grounds of the discovery of such new and important matter or evidence as aforesaid or of some clerical error apparent on the face of the decree, no application for a review of judgment other than that of a High Court shall be made to any Judge other than the Judge who delivered it." Section 626 provides that "if it appears to the Court that there is not sufficient ground for a review, it shall reject the application. If the Court be of opinion

that the application for the review should be granted it shall grant the same, and the Judge shall record with his own hand his reasons for such opinion: Provided (*a*) no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree a review for which is applied for; and (*b*) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him, when the decree or order was passed, without strict proof of such allegation; and (*c*) an application made under section 624 to the Judge who delivered the judgment may, if that Judge has ordered notice to issue under proviso (*a*) to this section, be disposed of by his successor." It is only necessary now to refer to section 629, which provides that "an order of the Court rejecting the application shall be final; but whenever such application is admitted the admission may be objected to on the ground that it was—(*a*) in contravention of the provisions of section 624, (*b*) in contravention of the provisions of section 626, or (*c*) after the expiration of the period of limitation prescribed therefor and without sufficient cause. Such objection may be made at once by an appeal against the order granting the application or may be taken in any appeal against the final decree or order made in the suit." No provision is made in section 588 of the old Code for an appeal from order in the case of an order granting a review; and the power to appeal such as it is rests on section 629 alone. It is in that respect that there is a slight difference between the old and the present Code.

The view taken by Mr. Justice Chatterjea in affirming the lower Appellate Court is that "strict proof" means proof that convinced the lower Appellate Court,

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JENKINS C.J.

and it is on that ground, and on that ground alone, that the result can be affirmed. In my opinion, this is not the true view of the provisions of this chapter relating to review of judgments. The word "proof" ordinarily has one of two meanings: either the conviction of the judicial mind on a certain fact, or the means which may help towards arriving at that conviction. The use of the word "strict" seems to me to point to the second of these two meanings, and "strict proof," in my opinion, means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence. It is formality which is prescribed and not the result that is described. This, I think, is apparent from the whole scheme of this chapter on review. For instance, we find on one side that the rejection of an application for a review is final. There is no enquiry into the merits. On the other hand, we find that the granting of a review is not final; and, as I read the chapter, it means this, that when a review is granted certain formalities have to be observed—formalities designed to secure that the applications for review should not be too readily and thus improperly granted. An examination of section 629 appears to me to support that view. It limits the grounds on which objections may be taken to the admission of a review; and the first ground described shows that an objection may be taken when the admission has been in contravention of the provisions of section 624, that is to say, it has been made to a Tribunal that has no power to grant it. Passing over for a moment section 629 (*b*) we find that another objection allowed by section 629 (*c*) is that the application is made after the expiration of the period of limitation prescribed therefor, and without sufficient cause. Then we come to the only other objection,

which is that it is in contravention of the provisions of section 626 ; and section 626, so far as it relates to this topic, requires that there should be strict proof of the allegation. That appears to me to mean that there must be proof adduced before the Court that has to deal originally with the question of granting a review. Where there has been placed before that Court such evidence or other mode of proof as the law requires and permits, I cannot think that it was intended that on appeal under section 629 it was to be open to the Appeal Court to say though there has been legal evidence, and in that sense strict proof, that proof did not convince it though it convinced the Judge who heard the witnesses, and therefore the application and the order granting the review were *ultra vires* and beyond the competence of the Court. That would bring into litigation fresh elements of chances and speculation. I think that the whole scheme of the Act recognises that with proper safeguards the Court of first instance is the proper Court to determine whether or not there should be a review, but that before a review is granted those safeguards must be observed. These safeguards have been observed in this case. I, therefore, think that the judgment of Mr. Justice Chatterjea is erroneous and must be set aside and also the decree of the lower Appellate Court. The case must therefore go back to the lower Appellate Court to be re-heard on the merits. The appellants before us are entitled to all the costs in the High Court.

WOODROFFE J. The learned Subordinate Judge has held that an Appellate Court can consider whether there was strict proof of the allegations on which an application for a review was made. Assuming for the sake of argument that this is so, a question arises—what is the meaning of strict proof? The Subordinate

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WOODROFFE J.

Judge was in effect of opinion that though the evidence was presented with strict formality, he could reject it as not being strict, because in his opinion it was insufficient, that is, lacking sufficient probative force in his eye to establish the allegations of the party applying for a review. I do not think this is correct. The term "strict" refers in this section, in my opinion, to formalities. Thus the section requires that formalities of law should be observed such as issue of notices, taking of evidence on oath or affirmation, legal proof of documents, cross-examination so forth. If such legal evidence be wanting objection may be made in appeal under Order XLVII, rule 7. This rule does not, I think, refer to the weight or sufficiency of the evidence. If the legal formalities are observed it is no objection that the probative force of evidence legally taken appears to be different to the Appellate Court from what it appeared to the Court granting review. In the present case the evidence was legally taken, but the Appellate Court disbelieved the evidence. The latter, after criticising the evidence, says that he disbelieves it; and because the first Court did believe it held that it was acting *ultra vires*. As an instance of the nature of the ground upon which the lower Appellate Court proceeded I may refer to the following passage in his judgment: "Then it is not at all likely that the defendants would forget all about their own rent receipts which they had filed in a previous suit regarding this very property. I therefore disbelieve their story." "Strict proof" in my opinion means proof according to the formalities of law. It does not refer to sufficiency of proof in securing a particular conviction. Thus an appeal has been allowed where the Judge has not recorded his reasons for granting an application for a review [see the case of *Gyanund*

Asram v. *Bepin Mohun Sen* (1)] or where he granted a review without enquiry or proof that the evidence was not within the knowledge of the applicant at the hearing or could not be adduced by him before the decree was passed [see the case of *Bhyrub Chunder Surmah Chowdhuri* v. *Madhub Chunder Surmah* (2)]; or where by going through the evidence a second time the Judge might come to a different conclusion [see the case of *Chunder Churn Auggrodany* v. *Loodunram Deb* (3)]; or merely to enable the case to be re-argued [see the case of *Koleemuddeen Mundul* v. *Heerun Mundul* (4)]. In all these cases there was an absence of due formalities required by law. Whether the proof is according to law or not is within the jurisdiction of the Appellate Court to determine. The question of sufficiency of evidence is for the Court admitting the review. I may add here that the result of holding otherwise would be to affirm a judgment of a Judge in whose opinion it was erroneous. I therefore agree with the order passed by the Chief Justice.

G. S. *Appeal allowed: case remanded.*

(1) (1895) I. L. R. 22 Calc. 734.
(2) (1873) 11 B. L. R. (F. B.) 423; 20 W. R. 84.
(3) (1876) 25 W. R. 324.
(4) (1875) 24 W. R. 186.

FULL BENCH.

Before Jenkins C.J., Woodroffe, Mookerjee, Holmwood and D. Chatterjee JJ.

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April 12.

RUP KISHORE LAL

v.

NEMAN BIBI.*

Transfer—Transfer by District Judge of particular case to Additional Judge —Civil Courts Act (XII of 1887), ss 8 sub-s. (2), 22, sub-s. (2)— Probate and Administration Act (V of 1881), ss. 3, 51, 53.

It is competent to a District Judge to transfer a particular case to an Additional Judge under the provisions of sub-s. (2) of s. 8 of the Civil Courts Act of 1887.

REFERENCE to FULL BENCH by Mookerjee and Beachcroft JJ.

Appeal by Rup Kishore Lal, the objector.

This appeal was filed against the decree of Moulvi Ali Ahmed, Additional District Judge, Shahabad, dated the 9th March, 1914, made in a proceeding for grant of Letters of Administration with a copy of the will annexed to the estate of one Musammat Mohun Koer, deceased. The facts appear fully from the following Order of Reference :

"This appeal is directed against the grant of Letters of Administration, with a copy of the will annexed, to the estate of one Mussammat Mohun Koer. The application was presented to the District Judge on the 16th July and registered in his Court on the 1st August, 1913. After various interlocutory orders to which reference is not necessary for our present purpose, the case was transferred to the Additional Judge for disposal on the 18th December, 1913. The record does not show that any objection was taken to the order of transfer or to the trial of the case by the Additional Judge, but it has been stated before us that an objection was taken verbally and was

* Reference to Full Bench in Appeal from Original Decree, No. 107 of 1914.

overruled. It is immaterial, however, whether such objection was taken or not, because the question is one of jurisdiction, and if the order of transfer was made without jurisdiction and if the Additional Judge was incompetent to try the case, it is open to the appellant to challenge the legality of his order on that ground.

On behalf of the appellant it has been contended that, under s. 51 of the Probate and Administration Act, the District Judge alone has jurisdiction in granting Letters of Administration in all cases within his district. The expression "District Judge" is defined in s. 3 of the Probate and Administration Act to mean the Judge of a principal Civil Court of original jurisdiction. An Additional Judge is *prima facie* a Judge of this description. Our attention is invited, however, to s. 8, sub-section (*2*) of the Bengal Civil Courts Act, 1887, which provides that an Additional Judge appointed under sub-section (*1*) shall discharge any of the functions of a District Judge which the District Judge may assign to him, and in the discharge of those functions, he shall exercise the same powers as the District Judge. The appellant argues that as the District Judge transferred only this particular case for trial to the Additional Judge, and did not assign to him his functions as a District Judge in respect of any specified class of cases, the Additional Judge was not competent to hear the case. In support of this contention, reliance has been placed upon the decision in *Mahomed Musa* v. *Abul Hassan Khan* (1), which apparently supports the argument of the appellant. The view taken in this case, however, is opposed to that adopted in the case of *Rakal Chandra Tewari* v. *The Secretary of State for India in Council* (2). In that case it was contended on behalf of the appellant that, under s. 8 of the Bengal Civil Courts Act, the District Judge had power only to assign certain functions to the Additional District Judge, that is to say, that he could assign to him particular classes of cases, but could not transfer to him any particular case for decision. Rampini J., in answer to this contention stated that he was unable to accede to this view of the matter, and Woodroffe, J., expressed his concurrence with Rampini J. But it has been suggested that the case of *Rakal Chandra Tewari* v. *The Secretary of State for India in Council* (2), is distinguishable, inasmuch as there the question arose in relation to the transfer of an appeal, as to which provision is made in sub-section (*2*) of s. 22 of the Bengal Civil Courts Act. The distinction, however, is really not material, because under sub-section (*2*) of s. 22 a District Judge is competent to transfer an appeal to a Court under his administrative control competent to dispose of it, and whether the Additional Judge is or is not competent to dispose of an appeal transferred to him by the District Judge must depend upon the interpretation to be placed upon

(1) (1914) I. L. R. 41 Calc. 866; 18 C. W. N. 612.

(2) (1906) 8 C. L. J. 34; 10 C W. N. 841.

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sub-section (*2*) of s. 8. Consequently, there is a clear conflict of judicial opinion as to the true scope and effect of sub-section (*2*) of s. 8.

We may add that we feel no doubt that the view taken in the case of *Rakhal Chandra Tewary* v. *The Secretary of State for India in Council* (1) gives effect to the true intention of the Legislature. It appears to us to be fairly clear that, if it is competent to a District Judge, under sub-section (*2*) of s. 8, to assign his functions to an Additional Judge in respect of a class of cases, there is no intelligible reason why he should not do so in respect of a particular case comprised within that class. We may further observe that the case of *Rakal Chandra Tewari* v. *The Secretary of State for India in Council* (1) was not brought to the notice of the Divisional Bench which decided the case of *Mahomed Musa* v. *Abul Hassan Khan* (2).

In these circumstances, we are constrained, under paragraph 1 of Chapter V of the Rules of the High Court, to refer this case for decision by a Full Bench. As the question arises in an appeal from Original Decree, under Rule 3, the question of law alone is referred. The question is, whether, in view of the provisions of sub-section (*2*) of s. 8 of the Bengal Civil Courts Act (XII of 1887), it is competent to a District Judge to transfer a particular case to an Additional Judge.

Babu Kulwant Sahay, for the appellant. Under section 51 of the Probate and Administration Act the District Judge alone has jurisdiction in granting Letters of Administration in all cases within his district, and "District Judge" is defined in section 3 of that Act to mean the Judge of a principal Civil Court of original jurisdiction. In non-contentious cases applications can be received by District Delegates. Further section 53 makes the Code of Civil Procedure applicable, and a District Judge can transfer such proceedings under section 24 of the Code. Sub-section (*4*) of section 2 of the Code defines "District Court," and sub-section (8) thereof defines "Judge" to mean the presiding officer of a Civil Court.

[HOLMWOOD J. Is the Additional Judge subordinate to the District Judge?]

Yes.

(1) (1913) 8 C. L. J. 34; 10 C. W. N. 841.

(2) (1914) I. L. R. 41 Calc. 866; 18 C. W. N. 612.

Sub-section (*3*) of section 24 of the Code of Civil Procedure makes the Court of the Additional Judge subordinate to the District Court.

[JENKINS C. J. It was a transfer to the Court of the Additional Judge, and before he can try the case he must be competent to try it.]

Section 3 of the Bengal Civil Courts Act provides for four distinct Courts, the Additional Judge's Court being one. Section 8 deals with the appointment of Additional Judges, and in sub-section (*2*) of section 8 the law contemplates the delegation of the District Judge's functions, and only thereafter can the *particular* case be transferred to the Additional Judge.

[D. CHATTERJEE J. Must the District Judge completely assign those functions?]

There can be a partial assignment after the vesting of jurisdiction.

[MOOKERJEE J. Do you say that there should first be an order by the District Judge transferring his functions, and then another transferring the particular case?]

The District Judge has Sessions functions also. Here he is to delegate to the Additional Judge his function to hear Probate and Administration cases.

[*Babu Umakali Mookerjee* (for the respondent). I rely on section 8 of the Bengal Civil Courts Act; in the alternative I say the transfer was under section 24 of the Code, or under the District Judges' administrative powers, as under section 9 of the Bengal Civil Courts Act, the Court of the District Judge has administrative control of the Court of the Additional Judge.]

Sub-section (*2*) of section 8 deals only with *class* of cases or functions.

[MOOKERJEE J. Suppose the District Judge assigns one case to the Additional Judge.]

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That is not functions. The question is whether the transfer of one case alone means transferring functions or jurisdiction. The provisions in the Madras and Bombay Civil Courts Acts are quite different, as the Legislature has conferred jurisdiction on them.

He can take up cases by way of transfer from the Additional District Judge. Under section 11 the District Judge may transfer an individual case.

[HOLMWOOD J. He thus distributes cases among his subordinate Courts.]

Yes. Similarly under section 22 the function of hearing an appeal, but not of receiving an appeal can be transferred. In *Mahomed Musa's Case* (1), Stephen J. took that view regarding section 92 of the Code that the assignment must be general for a *class* of cases.

[JENKINS C. J. What do you mean by "class of cases?" Suppose the general list is very heavy, can't the District Judge transfer some of those cases?]

Yes. If he has first assigned his functions and thus given jurisdiction.

Power is jurisdiction, while function is duty. Mere conferring of powers does not give functions. In *Bidya Moyee Debya Cho vdhurani* v. *Surja Kanta Acharji* (2) the same view has been taken by Ghose and Holmwood JJ. at p. 880 regarding appeals.

[MOOKERJEE J. That case has been often criticised.]

Yes. In *Abdul Karim* v. *Abdus Sobhan* (3), and also by Rampini J. in *Rakhal Chandra Tewary's Case* (4).

[HOLMWOOD J. Those remarks in *Bidya Moyee Debya* (2) are *obiter*, and I cannot associate myself with the general remarks in that judgment.]

(1) (1914) I. L. R. 41 Calc. 866; 18 C. W. N. 612.
(2) (1905) I. L. R. 32 Calc. 875.
(3) (1911) I. L. R. 39 Calc. 146.
(4) (1906) 10 C. W. N. 841; 8 C. L. J. 34.

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[JENKINS C.J. What are the sections under which a District Judge can transfer a case?]

Section 24 of the Code, or under his administrative powers under section 11 of the Bengal Civil Courts Act and also under section 92 of the Code as laid down in *Abdul Karim* v. *Abdus Sobhan* (1). The provisions of section 51 of the Probate and Administration Act are the same as section 92 of the Code.

[D. CHATTERJEE J. If functions mean official duties, are those to be transferred also?]

That is what these cases decide. After this jurisdiction has been conferred by the District Judge there will be two Courts.

The principle is the same that one case cannot be transferred to another Court unless it has jurisdiction to try all such cases.

"Functions" means jurisdiction. The only case against me is that of *Rakhal Chandra Tewari*(2) where Rampini J. said it would mean the transfer of functions in *one* case also. In the case of the inferior Courts a Judge can't be held to have jurisdiction unless it is expressly given, while in the case of the superior Courts jurisdiction is presumed unless explicitly removed.

Babu Umakali Mookerjee, *Babu Raghunath Singh* and *Babu Sudhangsu Shekhar Mookerjee*, for the respondent, were not called upon to reply.

The judgment of the Court (JENKINS C. J., WOODROFFE, MOOKERJEE, HOLMWOOD AND D. CHATTERJEE JJ.) was delivered by

JENKINS C.J. The question proposed for our determination is, whether, in view of the provisions of sub-section (*2*) of section 8 of the Bengal Civil Courts Act (XII of 1887), it is competent to a District Judge to

(1) (1911) I. L. R. 39 Calc. 146.

(2) (1906) 8 C. L. J. 34; 10 C. W. N. 841.

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transfer a particular case to an Additional Judge. We answer the reference in the affirmative. The reasons which induce us to adopt that conclusion are sufficiently set forth in the Order of Reference, and we need not repeat them.

The case will go back to the Divisional Bench for final disposal. The Divisional Bench will deal with the costs of this reference.

G. S.

APPELLATE CIVIL.

Before Coxe and Richardson JJ.

SHEONANDAN LAL

v.

ZAINAL ABDIN.*

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Nov. 25.

Debt—Charge—Assignment—Transfer of Property Act (IV of 1882), s. 55, sub-s. (4).

There is no authority for the contention that a charge such as the one mentioned in s. 55, sub-s. (*4*) of the Transfer of Property Act, is merely a personal right which cannot be transferred to an assignee. The debt could undoubtedly be transferred and there is no reason why the security for the debt should not also be transferred with it..

Hari Ram v. *Denaput Singh* (1) and *Moti Lal* v. *Bhagwan Das* (2) distinguished.

SECOND APPEAL by Sheonandan Lal, the defendant No. 2.

This appeal arose out of a suit to recover 1,600 rupees with interest by the sale of 3 annas and odd share of mouza Dum Duma. Originally it appears that Hafiz Ashraf Husain, paternal grandfather of the present plaintiffs, was a plaintiff with them and claim was made by him and the present plaintiffs jointly. He died during the pendency of the suit and on his death his son Abdul Rawoof and his daughters, Bibi Sagheran and Bibi Soghra, were added as defendants Nos. 5 and 7. Bibi Azizan is another daughter of Hafiz Ashraf Husain but she has been a defendant ever since the filing of the suit.

* Appeal from Appellate Decree, No. 245 of 1911, against the decree of H. Foster, District Judge of Saran, dated Sept. 24, 1910, modifying the decree of Baroda Prosad Roy, Munsif of Chapra, dated Feb. 26, 1910.

(1) (1882) I. L. R. 9 Calc. 167. (2) (1909) I. L. R. 31 All. 443.

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Ashraf Husain's son Abdul Huq, late father of the present plaintiffs, and Ashraf Husain himself executed a registered sale deed, dated the 5th of November 1902, in favour of defendants Nos. 1 to 3 conveying 3 annas and odd share of mouza Dum Duma to them for Rs. 2,000. Out of the consideration money Rs. 500 passed at the time of the execution of the deed and Rs. 1,500 was kept in deposit with the purchasers, the defendants Nos. 1 to 3, in order to pay up two debts, namely, Rs. 500 to Nural Huq and Rs. 1,000 to Mohamad Kazim who held possession of mouza Mohamadpur Ghalib and Gopepur Katsa as *zurpeshgidar* upon a registered mortgage deed by way of conditional sale executed by Hafiz Ashraf Husain. Rupees 500 has been paid to Nurul Huq and the allegation in the plaint is that Rs. 1,000 was not paid to Mohamed Kazim and hence the suit as originally framed for recovery of the money by the sale of the property, part of the consideration of the sale of which was the money alleged to be due, under section 55 (*4*) (*b*) of the Transfer of Property Act. Interest has been claimed on the money by way of the annual profit alleged to be Rs. 120 per year which the original plaintiffs would have derived from Mohamedpur Ghalib and Gopepore Katsa had it been redeemed with the sum of Rs. 1,000 by payment of the same to Mohamed Kazim.

After the execution of the sale deed in favour of the defendents Nos. 1 to 3, Ashraf Husain executed a registered sale deed dated the 24th of March 1904 in favour of his daughter Azizan Bibi, defendant No. 4, in the suit which purported to convey Mohamedpur Ghalib and Gopepur Katsa to her. It was alleged in the original plaint that the deed was a *benami* one executed for family purposes without any consideration and that the defendant No. 4 derived no interest under it.

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Before the institution of the suit a notice is alleged to have been served on the defendants, Nos. 1 to 3, for payment of the sum of Rs. 1,000 with interest but no reply is alleged to have been received.

When Abdul Huq died on the 7th of April 1907 after the service of the notice, the present plaintiffs joined with their paternal grandfather Hafiz Ashraf Husain in bringing this suit and jointly claimed the money. After the death of Hafiz Ashraf Husain, during the pendency of this suit, a petition to amend the plaint was filed in which there was mention of a registered *ladavi* deed dated the 1st of August 1905 executed by Hafiz Ashraf Husain in favour of his son Abdul Huq father of the present plaintiffs. By this deed Ashraf Husain disclaimed interest in the sum of Rs. 1,000 kept in deposit with the defendants Nos. 1 to 3 in favour of his son Abdul Huq. According to that petition the defendants Nos. 5 to 7 have been added and the case of the present plaintiffs is that as Ashraf Husain inherited a sixth share of the money from Abdul Huq after his death and as the defendants Nos. 4 to 7 have inherited the same one-sixth share after the death of Ashraf Husain they the present plaintiffs are entitled to get five-sixths of the money claimed.

The defendants Nos. 1 and 3 and 5 to 7 did not appear to contest the plaintiffs' suit though they were duly served with summons. The defendant No. 2 filed a written statement and so did the defendant No. 4.

The defendant No. 2 contended that the cause of action, as alleged in the plaint, was incorrect; that the plaintiffs had no cause of action; that the suit was not maintainable as the plaintiffs brought it without taking a succession certificate; that the plaintiff's suit was barred by limitation; that the sale deed

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executed by Hafiz Ashraf Hussain, in favour of Azizan, the defendant No. 4, was not *benami* and without consideration as alleged in the plaint; that the *ladavi iqrarnama* executed by Hafiz Ashraf Husain in favour the plaintiff's father was fraudulent, the executant having no right to Mohamadpur Ghalib and Gopepur Katsa at the time of the execution of the *iqrarnama* aforesaid; that the plaintiffs had no right to the money claimed; that before Bhado 1310 F. S., the due date for payment of Rs. 1,000, Mohamed Kazim died; that the heirs of Ashraf Husain did not take out succession certificate and so the money could not be paid to them; that Ashraf Husain was informed of this and he subsequently sold his interest in Mohamadpur Ghalib and Gopepore Katsa to his daughter, defendant No. 4; that the sum of Rs. 1,000 was subsequently paid to the defendant No. 4 by the defendant No. 2 and that the plaintiffs are not entitled to any relief.

The defendant No. 4 in his written statement supported the defendant No. 2 who purchased defendant No. 4's interest in Mohamadpur Ghalib and Gopepur Katsa by a registered sale deed.

The plaintiffs subsequently took out succession certificate.

The Court of first instance decreed the suit in part for Rs. 1,597-8 with costs in proportion and future interest at 6 per cent. per annum until realization as against the defendants Nos. 1 to 3 only and the amount decreed was allowed to be recovered by sale of 3 annas of mouza Dum Duma.

Against this order of the Munsif the defendant, Sheonandan Lal, appealed to the District Judge of Saran. The appeal was allowed in a modified form. The plaintiffs were allowed Rs. 1,000 with interest at 6 per cent. from the 5th of November 1902 to the date of payment.

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In default of the defendants Nos. 1 to 3 paying this amount with costs within six months from date of decree the share of Mouza Dum Duma was to be put to sale and the proceeds appropriated to the liquidation of Rs. 1,000 *plus* interest at 6 per cent.

Hence this second appeal on behalf of Sheonandan Lall, the defendant No. 2.

Dr. Dwarka Nath Mitra (with him *Babu Satindra Nath Mookerjee*), for the appellant, contended that the right under section 55 of the Transfer of Property Act was merely a personal right in the vendor and it could not therefore be maintained by an assignee. The charge was a personal right in the vendor and he and he alone could invoke the aid of section 55, cl. (*4*) of the Transfer of Property Act. Under the English Law it was assignable but not so under the Indian Law. The language of the statute must be construed strictly. Moreover, the suit was barred by limitation. Article 132 does not apply to the case of an assignee. The proper article is Article 111. Lastly, the plaintiffs are not entitled to any interest. They had no interest to pay.

Moulvi Mahomed Mustafa Khan, for the respondents. Appellant's case was that the father had made an oral assignment of Rs. 1,000 to Azizan. The Judge has disbelieved the story of the assignment. The admitted fact is that the appellants have never paid Syed Mohamed Kazim the money which they had, undoubtedly, to pay. The result is that they have got Dum Duma without paying the full purchase-money for it.

The defendant No. 2 appeals in the capacity of a purchaser from Azizan Bibi.

Dr. Mitra, in reply.

Cur. adv. vult.

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COXE J. This was a suit for the recovery of Rs. 1,000 said to be a portion of the unpaid purchase money of Mouzah Dum Duma and therefore charged upon that village. This village was sold in 1902 by Ashraf Hossain and Abdul Huq to the appellant. Out of the purchase money a sum of Rs. 1,000 was kept by the appellant on the understanding that he should in September 1903 pay it to one Mahomed Kazim in payment of a mortgage by conditional sale of two villages which may briefly be described as Galib and Katsa.

Abdul Huq died and this suit was brought by Ashraf Hossain as one of Abdul Huq's heirs and by the other heirs of Abdul Huq. The facts are not very definitely found by the Courts below, but, if I understand their judgments right, they think that Ashraf Hossain in 1904 gave the right of redeeming Galib and Katsa to his daughter Bibi Azizan, in order that she might obtain those villages by paying the mortgage money viz. Rs. 1,000 from her own pocket; and that in 1905 he gave to Abdul Huq, his son, his interest in the right of recovering the sum of Rs. 1,000 which was in deposit with the appellant. The appellant had not paid the money although it was two years after the due date, and perhaps there seemed little likelihood of his doing so. In 1906 Abdul Huq gave the appellant notice to pay this money, but as he did not do so, the present suit was instituted. After the suit was instituted the appellant brought the equity of redemption of Galib and Katsa from Azizan and asserts that he gave her the sum of Rs. 1,000 to be paid by her to the original mortgagee. This allegation was supported by Azizan. The Court below does not believe that this sum was ever paid and has given the plaintiffs a decree.

On behalf of the appellant it is first contended that the suit cannot be maintained by the present plaintiffs

on the ground that the charge mentioned in section 55 sub-section (*4*) clause (*b*) of the Transfer of Property Act, 1882, is a personal right of the seller himself, and cannot be transferred to an assignee. There is, however, no real authority in support of this view. The cases cited, *Hari Ram* v. *Denaput Singh* (1) and *Moti Lal* v. *Bhagwan Das* (2) are quite different and do not support the present contention. The debt itself could certainly be transferred, and I see no reason why the security for the debt should not also be transferred with it.

Secondly, it is contended that, as the defendant says that he has paid Azizan and is supported by Azizan, the plaintiffs can have no right to the money. The Judge, however, finds as a fact that this payment was not made. And if it is the case, as the Courts below evidently think, that in consequence of the appellant's neglect to pay the money Ashraf Hossain decided to cancel the arrangement, under which the appellant had to pay the money to the original mortgagee, and transferred to Abdul Huq his right to recover the money directly from the appellant, the payment to Azizan could not possibly be a valid discharge of the appellants' obligation. Notice was given to the appellant to return the money before the institution of the suit and the alleged payment to Azizan was made long after the suit was instituted.

The only other point that has been pressed is that the plaintiffs are not entitled to the whole of the money. This, however, is not raised in the grounds of appeal, and the other defendants who are prejudiced by this decision, if it is wrong, in this respect, do not appeal. The appellant is clearly bound to pay the sum and it matters nothing to him how the plaintiffs and the other defendants divide it among themselves.

(1) (1882) I. L. R. 9 Calc. 167. (2) (1909) I. L R. 31 All. 443.

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The appeal must be dismissed with costs.

RICHARDSON J. I agree.

S. K. B. *Appeal dismissed.*

APPELLATE CRIMINAL.

Before Fletcher and Beachcroft JJ.

1914

Dec. 1.

SHASHI RAJBANSHI
v.
EMPEROR.*

Pardon—Failure of approver to comply with terms of the pardon on examination at the preliminary inquiry—Forfeiture of pardon—Commitment of approver along with other accused—Joint trial of approver and others—Plea of pardon taken in the Sessions Court—Proper procedure thereon—Trial of question of forfeiture as a preliminary issue—Power of Jury to determine the point—Criminal Procedure Code (Act V of 1898), ss. 298 (1) (c), 337.

Where an approver has forfeited his pardon, on his examination at the preliminary enquiry, the Magistrate may put him in the dock, recommence the enquiry and commit him for trial along with the other accused.

Queen-Empress v. *Natu* (1) discussed.

Queen-Empress v. *Brij Narain Man* (2), *Emperor* v. *Budhan* (3), *Sultan Khan* v. *King-Emperor* (4) and *King-Emperor* v. *Bala* (5) followed.

When an approver has been committed to the Court of Session as an accused he may plead his pardon in bar at the trial, and the Judge must first try the issue of forfeiture and take the verdict of the Jury thereon, and then proceed with the trial of the accused for the offences charged.

Emperor v. *Abani Bhushan Chuckerbutty* (6) discussed.

Kullan v. *Emperor* (7), *Alagirisami Naicken* v. *Emperor* (8), *King-*

* Criminal Appeal, No. 703 of 1914, against the order of W. A. Seaton, Sessions Judge of Murshidabad, dated July 15, 1914.

(1) (1899) I. L. R. 27 Calc. 137.
(2) (1898) I. L. R. 20 All. 529.
(3) (1906) I. L. R. 29 All. 24.
(4) (1908) 5 All. L. J. 691.
(5) (1901) I. L. R. 25 Bom. 675.
(6) (1910) I. L. R. 37 Calc. 845.
(7) (1908) I. L. R. 32 Mad. 173.
(8) (1910) I. L. R. 33 Mad. 514.

Emperor v. *Bala* (1), *Emperor* v. *Kothia* (2) and *Emperor* v. *Kalu* (3) approved.

Per BEACHCROFT J. Under the old law the pardon remained in force until its withdrawal, by the authority granting it, in consequence of the approver failing to observe the conditions of the pardon, but under the present law the result of such failure is that the approver may be put on trial without any formal order of withdrawal or cancellation of the pardon. The plea should be taken at the commencement of the preliminary enquiry and considered by the Magistrate. If he decides against it or it is not taken before him, the approver may raise the plea in the Sessions Court. The Judge ought to try the question of forfeiture as a preliminary issue, on evidence limited to the point, and take the verdict of the Jury on it before proceeding to try the general issue of the guilt of the accused. The onus of proof of forfeiture is on the Crown.

Queen-Empress v. *Manick Chandra Sarkar* (4) declared obsolete.

Where, however, the Judge tried the question of forfeiture with the Jury after some evidence on the general issue had been recorded :—

Held, that the irregularity had not prejudiced the approver or the other accused.

Semble : When the approver deviates from the conditions of his pardon in the Sessions Court, he cannot be removed from the witness box and placed in the dock as an accused.

AT about 1 A.M. on the 1st January 1914, the appellants and others, numbering 20 or 25 men, were alleged to have committed dacoity in the house of one Shamapada Das, deceased, in Kandra, in the District of Murshidabad. On the 17th January the appellant, Shashi Rajbanshi, was arrested and made a confession, two days later, before Babu Tara Pada Chatterjee, a Sub-Deputy Magistrate of Kandi. On the 21st one Kudu Shaik was arrested and made a similar confession to the same officer. Both the accused were tendered conditional pardons, under s. 337 of the Criminal Procedure Code, by the Sub-divisional Officer of Kandi on the 21st April. At the

(1) (1901) I. L. R. 25 Bom. 675.
(2) (1906) I. L. R. 30 Bom. 611.
(3) 31 Punj. Rec. 1904.
(4) (1897) I. L. R. 24 Calc. 492.

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preliminary enquiry, which commenced on the same day, Shashi was examined as the first prosecution witness, when he denied all knowledge of the dacoity and alleged that his confession was untrue. He was accordingly put into the dock as an accused by the Magistrate, and the enquiry proceeded against him and the other accused. They were committed jointly to the Court of Session on the 5th June on a charge of dacoity.

The trial of Shashi and the others commenced on the 3rd July before the Sessions Judge of Murshidabad. Shashi stated that he had been pardoned and was a witness and could not be jointly tried with the rest, and that he was not guilty. An objection was taken that his pardon could not have been legally withdrawn, nor could he have been put into the dock and committed jointly with the other accused, and that the joint trial was bad. The Jury were then empanelled and the Public Prosecutor opened his case and examined seven witnesses. On the 4th July four more witnesses were examined. Several of the eleven witnesses deposed to the facts of the dacoity. The evidence of Shashi before the committing Magistrate was read. Thereupon the arguments of the Public Prosecutor and the defence pleader were heard on the preliminary point. On the 6th the Jury were charged by the Judge upon the question whether Shashi had forfeited his pardon, and they returned a verdict in the affirmative, which was accepted by the Judge. The trial then proceeded and the remaining evidence was taken. The Jury at the close of the trial found the seven appellants, including Shashi, guilty of dacoity, on the 15th July, and the Judge sentenced them, under s. 396 of the Penal Code, to seven years' rigorous imprisonment and acquitted the rest. The convicted prisoners appealed to the High Court.

Babu Hemendra Nath Sen (with him *Babu Santosh Kumar Bose*), for the appellants. Shashi could not have been tried jointly with the other accused, but should have been tried alone: *Queen-Empress* v. *Bhau* (1), *Queen-Empress* v. *Jagat Chandra Mali* (2), *Queen-Empress* v. *Ramasami* (3). The procedure of the Magistrate in committing him jointly is illegal: he should have been examined at the trial as a witness: *Queen-Empress* v. *Natu* (4). The Court granting the pardon is alone competent to withdraw it. The Sessions Judge could not: *Queen-Empress* v. *Manick Chandra Sarkar* (5), *Emperor* v. *Abani Bhushan Chuckerbutty* (6). At all events the question of forfeiture was one for the Judge and not the Jury under s. 298 (*1*) (*c*) of the Code. After eleven witnesses had been examined by the Judge the Jury were asked to give their verdict on the point of forfeiture. The Jury having found against Shashi were no longer competent to try him for the offence charged, as they had become prejudiced against this appellant. The Judge also misdirected the Jury.

The Deputy Legal Remembrancer (*Mr. Orr*) (with him *Babu Jyotish Chandra Hazra*), for the Crown. When the Magistrate found that the approver had forfeited his pardon, it was open to him to put the latter in the dock and commit him jointly. The procedure of the Judge was not illegal.

Cur. adv. vult.

FLETCHER J. The accused Ananta, Nani, Shashi, Gopal, Srikanta and Bolai were tried along with seven others, who have been acquitted, with having committed the offence of dacoity.

(1) (1898) I. L. R. 23 Bom. 493.
(2) (1894) I. L. R. 22 Calc. 50.
(3) (1900) I. L. R. 24 Mad. 321.
(4) (1899) I. L. R. 27 Calc. 137.
(5) (1897) I. L. R. 24 Calc. 492.
(6) (1910) I. L. R. 37 Calc. 845

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The trial took place before the learned Sessions Judge of Murshidabad and a Jury. The six appellants before us were convicted and each sentenced to undergo seven years' rigorous imprisonment. Against that conviction and sentence they have appealed to this Court. The principal point that has been argued on this appeal is as to the legality of the trial before the learned Sessions Judge. It appears that the accused Shashi was tendered and accepted a pardon under section 337 of the Code of Criminal Procedure, on the 21st of April 1914, whilst the proceedings were pending before the Committing Magistrate. The Magistrate subsequently forfeited the pardon granted to Shashi and the magisterial inquiry was recommenced from the stage at which it was interrupted as against Shashi by the tender and acceptance of the pardon. The Magistrate committed all the accused for trial. Shashi having raised, before the learned Judge, a plea in bar on the ground that he had received a pardon, the learned Judge took a special verdict from the Jury in the first instance as to whether Shashi had forfeited his pardon. The Jury having returned a verdict that he had done so, the learned Judge then continued the trial against all the accused.

Against this procedure two points have been urged on the appeal before us: (i) that the procedure of the Magistrate in recommencing the magisterial inquiry against Shashi, from the stage it was interrupted by the tender and acceptance of the pardon, and the commitment of Shashi to take his trial with the other accused was illegal; and (ii) the taking of a special verdict of the jury as to whether the pardon granted to Shashi had been forfeited was also illegal. On the first point, authorities have been cited showing that when the approver deviates from the condition of his pardon in the Sessions Court, he cannot be removed from the

witness-box and placed in the dock as an accused. I should have thought that such a proposition did not require any authority. It is obvious that the Court of Sessions could not try a person who had not been committed for trial.

The question, however, as to whether or not an approver whose pardon has been forfeited by the Committing Magistrate can be committed and tried along with the other accused, is a totally different question.

On behalf of the appellants the decision in the case of *Queen-Empress* v. *Natu* (1) is much relied on. No doubt the observations of the learned Judges (Rampini and Pratt JJ.) in that case do lend support to the argument on behalf of the appellants. In that case, however, a charge had been framed against the two approvers under section 194 of the Indian Penal Code without the sanction of the High Court. The remarks of the learned Judges that a "person to whom a pardon has been made should not be tried for an alleged breach of the conditions upon which the pardon was tendered until the original case has been fully heard and determined" show clearly that what the learned Judges were considering was the charge under section 194 of the Indian Penal Code.

In my opinion that case cannot be taken as an authority for the proposition that, where the approver fails to act up to the condition of his pardon before the enquiring Magistrate, the Magistrate cannot recommence the inquiry as against the approver and commit him to take his trial along with the other accused.

As against the interpretation sought to be placed on the decision in the case of *Queen-Empress* v. *Natu* (1), by the learned vakil for the appellants, there is a considerable body of judicial authority in which a

(1) (1899) I. L. R. 27 Calc. 137.

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different view was taken. In the case of *Queen-Empress* v. *Brij Narain Man* (1), the learned Judges observed "We are unable to find anything in the Code of Criminal Procedure which would render it necessary that an approver whose pardon has been withdrawn by the Magistrate, and who has been committed by the Magistrate in time to stand his trial along with the other accused in the case, should be tried separately from them." A similar view was taken in the case of *Emperor* v. *Budhan* (2) and also in the case of *Sultan Khan* v. *King-Emperor* (3), and in the case of *King-Emperor* v. *Bala* (4) a similar view seems to have been taken by Fulton J.

I think that the opinions expressed in these cases are correct, and that the case of *Queen-Empress* v. *Natu* (5) is only an authority for what was actually decided in that case, namely, that "a person to whom a tender of pardon has been made should not be tried for an alleged breach of the conditions upon which the pardon was tendered until the original case has been fully heard and determined." These remarks appear to me to be only capable of referring to a charge under section 194, although, perhaps, the judgment is not very happily worded. In that view the opinions expressed in *Queen-Empress* v. *Natu* (5) are not in conflict with the judgments of the High Courts of Allahabad and Bombay which I have cited above. I think, therefore, that the commitment to, and trial before, the Sessions Court in the present case was not illegal.

The second question urged on this appeal is that the trial was illegal by reason of the learned Judge having taken a verdict from the Jury as to whether

(1) (1898) I. L. R. 20 All. 529.
(2) (1906) I. L. R. 29 All. 24.
(3) (1908) 5 All. L. J. 691.
(4) (1901) I. L. R. 25 Bom. 675.
(5) (1899) I. L. R. 27 Calc. 137.

Shashi had forfeited his pardon or not. The only case cited in support of this argument is the decision of this Court in the case of *Emperor* v. *Abani Bhushan Chuckerbutty* (1). That case came before a Special Bench of three Judges, consisting of Holmwood and Sharfuddin and D. Chatterjee JJ., under the provisions of the Criminal Law Amendment Act. Holmwood J. held that the Committing Magistrate was the sole authority to determine whether or not the pardon had been forfeited. The grounds on which Holmwood J. formed this opinion are stated by him as follows: "As soon as a charge is drawn up the accused is *ipso facto* put upon his defence ....." The word 'withdrawal' has been left out of the present Code, and, as I have just said, the forfeiture appears now to operate *ipso facto*." In support of this view the learned Judge relies on the case of *Queen-Empress* v. *Manick Chandra Sarkar* (2) which lays down that the withdrawal or forfeiture of the pardon should be by the authority that granted it. But that case did not decide that the validity of the withdrawal or forfeiture could not be questioned at the trial. The other case *Kullan* v. *Emperor* (3) relied on by Holmwood J., with all due respect to the learned Judge, decided exactly the opposite to what the learned Judge did. Towards the end of his judgment Holmwood J., however, remarked that "it is open to the accused here to show that the statement he made on oath was not a false statement, or was a false statement induced by improper influence." D. Chatterjee J. held that as the case came before the Court as a "Special Tribunal" under the provisions of the Criminal Law Amendment Act, the Court had no jurisdiction to enquire into the fact

(1) (1900) I. L. R. 37 Calc. 845. (2) (1897) I. L. R. 24 Calc. 492.
(3) (1908) I. L. R. 32 Mad. 173.

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whether the pardon had been properly forfeited or not. Chatterjee J, however, remarked that "it is perfectly open to the accused to show before us in this Court that the statements which are alleged to be false are true in fact or were induced by improper influences." The tribunal before which that case came was not a "Special Tribunal," but the High Court, though no doubt the Bench was specially constituted to hear a case committed to it under the provisions of the Criminal Law Amendment Act. The provisions of the law, except so far as they have been varied by the Criminal Law Amendment Act, apply to such trials.

I am unable to concur in the views expressed in the case of *Emperor* v. *Abani Bhushan Chuckerbutty* (1) which appears to me to be opposed to whole current of judicial decisions in India. Nor can I understand the remarks of the learned Judges that if the Committing Magistrate was the sole Judge as to whether or not the pardon had been forfeited, the accused could be permitted to give evidence to show that his former statement was true or induced by improper influences. Such evidence would be irrelevant on the charge of dacoity against the accused, but would be relevant on the issue as to whether the pardon had been validly forfeited. On the other hand, there are a number of authorities in which a different view has been taken.

In the case of *Kullan* v. *Emperor* (2), the learned Judges remarked "we think that where a pardon has been tendered and the approver is afterwards put on trial he should be asked if he relies on it, and if he says 'yes,' which is a plea of pardon, the issue as to the pardon should be tried first." Again, in the case of

(1) (1910) I. L. R. 37 Calc. 845. (2) (1908) I. L. R. 32 Mad. 173.

Alagirisami Naicken v. *Emperor* (1) it was held that the Judge at the trial at the sessions must leave it to the Jury to decide whether the pardon had been actually forfeited and not decide the point himself.

The High Court of Bombay has adopted a similar view. In the case of *King-Emperor* v. *Bala* (2) the following observations appear in the judgment of the learned Judges, " as the law now stands the question is whether the accused has forfeited his pardon by some act of his own, not whether the Magistrate has validly withdrawn it. This question is one of fact on which it is clear that the Magistrate may hold one opinion and the Sessions Court another, just as may happen on any other question of fact at issue in the case. The Sessions Court has to determine for itself on the evidence before it whether the pardon has been forfeited, for if not, the accused who has accepted such pardon cannot be tried." Again, in the case of *Emperor* v. *Kothia* (3), Aston J. remarked. " It is, therefore, open to a pardoned accomplice, if placed on trial as an accomplice who has forfeited the pardon already accepted by him, to plead in bar of the trial that he did comply with the condition on which the tender of pardon was made, and such plea in bar of trial would have to be gone into and decided before the accused is called to enter his plea in defence to the charge of having committed the offence in respect of which the pardon was tendered." The same view was taken by the Chief Court of the Punjab as will appear from the following remarks in the judgment in the case of *Emperor* v. *Kalu* (4): " the word ' withdrawn ' does not now appear at all." The word ' forfeited ' has been substituted. Under the present Code, therefore, a pardon cannot be withdrawn, it can only be forfeited

(1) (1910) I. L. R. 33 Mad. 514.
(2) (1901) I. L. R. 25 Bom. 675.
(3) (1906) I. L. R. 30 Bom. 611.
(4) 31 Punj. Rec. 1904.

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and whether or not it has been forfeited will be a question of fact to be tried and decided by the Court acting under competent authority which tries such person in respect of the charge in regard to which a pardon was tendered to him." Against this large body of judicial authority there is only the decision in the case of *Emperor* v. *Abani Bhushan Chuckerbutty* (1). But when that case is closely looked at it cannot be taken as an authority the other way. For the Court admitted evidence to show that the statement of the accomplice, whose pardon had been withdrawn, was not false and that such statement was induced by improper means, which was clearly irrelevant on the charge of dacoity but relevant on the plea as to whether the pardon had been validly withdrawn. In that view the judgments in the case of *Emperor* v. *Abani Bhushan Chuckerbutty*(1) can be reconciled with the decision of the other cases, I have referred to above, although it may not have been strictly regular, or in accordance with the weight of judicial opinion, to have tried the plea in bar along with the charge on which the accused was committed for trial. The course adopted by the learned Judge in the present case in taking a verdict from the Jury in the first instance on the plea in bar was manifestly correct.

Then a subsidiary point was raised that the fact that the learned Judge took the verdict of the Jury on the plea in bar raised by Shashi after recording some of the evidence on the charge vitiates the trial. But Shashi, when called upon to plead, raised his plea in bar in such an obscure manner that the learned Judge apparently in the first instance did not grasp what Shashi meant when he said he was a witness. As soon, however, as the learned Judge realized the plea

(1) (1910) I. L. R. 37 Calc. 845.

that Shashi wished to place before the Court, he proceeded in a regular manner, and any irregularity that there may have been cannot have prejudiced the accused at the trial. Finally it was argued that the learned Judge in his charge to the Jury on the charge upon which the accused had been committed for trial misdirected the Jury. I was and still am unable to appreciate what were the misdirections the learned vakil for the appellants complains of. But even if the portions referred to amounts to misdirections they are of such a trivial nature that they could not possibly have had any effect on the verdict of the Jury.

In the result, I think, the present appeal ought to be dismissed.

BEACHCROFT J. The learned pleader for the appellants bases his appeal on three grounds: (i) that the joint trial of the approver, Shashi, and the other accused was illegal, a branch of which argument is that it was incumbent on the prosecution to examine Shashi as a witness at the sessions trial; (ii) that the Judge adopted an extraordinary procedure in taking a verdict on the question whether Shashi had forfeited his pardon, after the examination of eleven only of the fifty-five prosecution witnesses, which seriously prejudiced the appellants; (iii) that there were misdirections in the charge to the Jury.

Many cases are to be found in the reports in which the question of the joint trial of an approver with the other accused has arisen, and in approaching a consideration of these cases there is a broad dividing line between the two classes into which they naturally fall, a line which, I think, has not always been observed.

One class comprises those cases in which at the sessions trial the approver has failed to observe the conditions of his pardon, and has then been transferred

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from the witness-box to the dock and tried with the other accused.

Instances of such cases are those of *Queen* v. *Pitumber Dhoobee* (1), *Queen* v. *Bipro Dass* (2), *In re Joyudee Paramanik* (3), *Queen-Empress* v. *Mulua* (4), *Queen-Empress* v. *Rama Tevan* (5) and *Queen-Empress* v. *Jagat Chandra Mali* (6). To the procedure adopted in such cases there has been a double objection, viz., that the trial of the approver was without jurisdiction, he never having been committed to the sessions, and that to take him straight from the witness-box to the dock and try him with the other accused prejudiced him in his defence.

The second class comprises those cases in which in the Magistrate's Court the approver has failed to observe the conditions of his pardon, and his pardon having been withdrawn the enquiry against him in respect of the offence has been continued along with the enquiry against the other accused, and they have jointly been committed to the sessions. It is clear that remarks made in the first class of cases to the effect that the trial of the approver should await the termination of the trial of the other accused can have no application to the totally different state of facts met with in the second class, when the approver comes before the Sessions Court as an accused and not as a witness, but those remarks have been quoted in support of the view that, when the pardon has been withdrawn before the case has come to the sessions, the joint trial is improper.

The current of decisions that the trial of the approver must await the trial of the other accused, even in the second class of cases, was started by the

(1) (1870) 14 W. R. Cr. 10.
(2) (1873) 19 W. R. Cr. 43.
(3) (1880) 7 C. L. R. 66.
(4) (1892) I. L. R. 14 All. 502.
(5) (1892) I. L. R. 15 Mad. 352.
(6) (1894) I. L. R. 22 Calc. 50.

case of *Queen-Empress* v. *Sudra* (1), decided by a single Judge. This case does not really fall within either of the classes to which I have referred, for the approver was committed to the sessions not on a charge of murder, which was the charge against the other accused, but in a separate proceeding on a charge of receiving stolen property belonging to the murdered man. The case turned on the meaning of the words "in the case" in section 337 of the Code of Criminal Procedure, and Knox J. remarked that the approver should not be tried till the original case had been fully heard and determined. That this *dictum* could not be universally correct was realised by the learned Judge who mentioned one difficulty which might arise from its universal application, viz., what was to be done when some of the accused in the original case absconded, and hinted that in such a case the rule might be relaxed.

This case was subsequently dissented from by a Division Bench of the same Court, in *Queen-Empress* v. *Brij Narain Man* (2), and the later decision was followed in *Emperor* v. *Budhan* (3).

Shortly after the decision in *Queen-Empress* v. *Brij Narain Man* (2), a Bench of the Bombay High Court in *Queen-Empress* v. *Bhau* (4) took the view that nothing could be done against an approver till the trial of the other accused at sessions was finished. The learned Judges relied on the case of *Queen-Empress* v. *Sudra* (1), and five other cases, not one of which is an authority for the general proposition stated. This case was doubted by Fulton J. in the later case of *King-Emperor* v. *Bala* (5) and the judgment of Candy J. shows that at an earlier stage a view inconsistent

(1) (1891) I. L. R. 14 All. 336.
(2) (1898) I. L. R. 20 All 529.
(3) (1906) I. L. R. 29 All. 24.
(4) (1898) I. L. R. 23 Bom. 493.
(5) (1901) I. L. R. 25 Bom. 675.

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with that expressed in *Queen-Empress* v. *Bhau*(1), had been adopted.

In this Court the only reported case is that of *Queen-Empress* v. *Natu* (2). In that case the commitment of the approver was criticised on three grounds, only two of which have any bearing on the present discussion. These are that it was obligatory that the approver should be available as a witness at the sessions trial, and that the commitment of the approver before the trial of the other accused had terminated was illegal. Logically, the second reason would appear to depend on the first, for if there is no obligation that the approver should be available as a witness at the sessions, there would appear to be no reason as a general proposition of law, for delaying his trial till the termination of the trial of the other accused; though circumstances might exist which would induce the Sessions Judge, as a matter of discretion, to direct a separate trial on the ground of inconvenience or possible prejudice to the other accused.

Section 337 (*2*) of the Code of Criminal Procedure provides that a person accepting a tender of pardon is to be examined as a witness in the case. That condition is fulfilled when the approver is examined as a witness in the Magistrate's Court. In my opinion, that sub-section does not mean that it is compulsory to examine the approver in the Sessions Court if he has shown by his evidence in the Magistrate's Court that he is an untrustworthy witness. It is contrary to all principles that the Crown should be obliged to examine as a prosecution witness a person who has shown himself by his evidence in a previous stage of the case to be untrustworthy. This view was taken in

(1) (1898) I. L. R. 23 Bom. 493. (2) (1899) I. L. R. 27 Calc. 137.

the case of *Queen-Empress* v. *Ramasami* (1). Incidentally I may remark that the view expressed in the same case that, beyond revoking the pardon nothing should be done against the approver until after the trial of the other accused is over, is *obiter dictum* and based on the case of *Emperor* v. *Bhau* (2) and the cases therein quoted, which apply to an entirely different state of facts.

It is to be noticed that the learned Judges who decided the case of *Queen-Empress* v. *Natu* (3) though referring to sub-sections (*2*) and (*3*) of section 337, say that the intention of the law is that the approver shall be "available" as a witness in the Sessions Court. If section 337 (*2*) really applies, his examination is compulsory. The language of the Code is imperative—"he shall be examined." I have pointed out that there is no obligation on the prosecution to examine him at the sessions trial, if he has previously shown himself untrustworthy. There is never any obligation on the accused to examine a witness, and with all respect to the learned Judges I see nothing in the section to lead to the supposition that no action is to be taken against him in order that he may be "available" as a witness for the defence. In fact he will be available as such witness if at the sessions trial he is able to successfully plead that he has not forfeited his pardon; though I do not wish to be understood as giving this contingency as a reason for differing from the view expressed in *Queen-Empress* v. *Natu* (3).

I am of opinion that where an approver has forfeited his pardon in the Magistrate's Court there is no illegality in proceeding with the enquiry against him

(1) (1900) I. L. R. 24 Mad. 321. (2) (1898) I. L. R. 23 Bom. 493.
(3) (1899) I. L. R. 27 Calc. 137.

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and in committing him for trial jointly with the other accused.

The second argument advanced by the learned pleader for the appellants was, as originally formulated, that the procedure of the learned Sessions Judge was unintelligible, and it is quite clear that he did not realise what the object of the learned Judge was. It would have been better if the learned Sessions Judge had clearly stated in his order sheet what was the preliminary point on which he heard arguments on the 4th July, but an examination of the earlier proceedings leads to the conclusion that he was trying a preliminary issue in bar on a plea by Shashi that he had been granted a pardon. On the charge being read the following plea by Shashi was recorded, that he is a witness, that he cannot be tried in this case and that he is "not guilty." This may reasonably be read as first a plea of pardon, second an objection to being tried jointly with the other accused, third, a plea of not guilty on the general issue.

It appears that an argument was then addressed to the learned Judge objecting to the Magistrate's procedure in "cancelling" the pardon and at once proceeding with the enquiry against the accused jointly. The learned Judge decided that he could do nothing in view of section 215 of the Code of Criminal Procedure. Then on the 4th July, after the examination of eleven witnesses, the evidence of Shashi given before the Committing Magistrate was read. This was followed by arguments on the "preliminary point." The Judge then charged the Jury, and took their verdict on the question whether Shashi had forfeited his pardon.

From this it is evident that the learned Judge was trying the preliminary issue raised by Shashi's plea of pardon as a bar to his being tried at all.

This raises the question whether the procedure

adopted was correct. The learned pleader for the appellants argues, in the first place, that the only person to decide whether the pardon was forfeited was the authority who granted the pardon, and, in the second, that if this was a question for the Court of Session it was one for the Judge to decide and not the Jury, and to support the second part of the argument he relies on section 298 (*1*) (*c*) of the Code of Criminal Procedure.

In the case of *Queen-Empress* v. *Manick Chandra Sarkar* (1) it was decided that the authority which granted the pardon was the authority which has jurisdiction to revoke it. That case was decided under the old Criminal Procedure Code, Act X of 1882. The decision has become obsolete, for Act V of 1898 made a radical alteration in the law. Under the existing Code there is no provision for withdrawing the pardon, but the first clause of section 339 shows in what circumstances the pardon is forfeited, and the second clause provides that when forfeited the approver's statement may be given in evidence against him. Under the old law the pardon remained in force until it was withdrawn by the authority granting it in consequence of a failure by the approver to observe the conditions under which it was granted. Under the present law the result of a failure to observe the conditions is that the approver may be put on his trial without any formal order of withdrawal or cancellation. The act terminating the pardon was, under the old law, the withdrawal by the granting authority: under the present law it is the forfeiture by the approver. It follows, as a matter of course, that when the approver is put on his trial he may plead his pardon, and in such case it must be shown that his pardon has been forfeited.

(1) (1897) I. L. R. 24 Calc. 492.

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Then arises the question what Court is to decide whether the pardon has been forfeited. The plea should, in my opinion, be taken at the commencement of the proceedings before the Magistrate, for it strikes at the jurisdiction to take any proceedings at all against the approver, and it would then be necessary for the Magistrate to consider whether the pardon had been forfeited. But if he decides against the approver, or even if the plea is not taken before the Magistrate, it does not follow that the plea cannot be pressed in the Sessions Court.

That is the Court which has to decide on the guilt or innocence of the accused, and I cannot conceive that the Court which has to adjudicate on that point has its hands tied in regard to what may be the strongest and perhaps the only point in the accused's defence. The position is exactly the same as in any ordinary sessions trial, *e.g.*, on a charge of criminal breach of trust. The Committing Magistrate has to be satisfied both of the trust and of the breach before he can commit, and the Sessions Court has to come to a finding on both points before it can convict. So if a pardon has been granted, the forfeiture must be proved.

When the case comes before the Sessions Court that Court ought to try the question whether the pardon has been forfeited before trying the general issue. It is possible that the evidence on the two issues may overlap and in some cases be practically identical, and that seems to me to be the only argument against trying the question of forfeiture of pardon before calling on the accused to plead to the charge of the offence, and where such is the case, it might be a reason for the Judge to use his discretion and order the approver to be tried separately from the other accused.

In expressing the above views as to the change

made in the law by Act V of 1898 and as to the duty of the Sessions Court to try the question whether the pardon was forfeited or not, I have not failed to consider the judgment of Holmwood J. in *Emperor* v. *Abani Bhushan Chuckerbutty* (1). It is true that the learned Judge expresses the opinion that the enquiry as to forfeiture should not be reopened at the trial, but in the concluding paragraph of his judgment he says,—"it is open to the accused here to show that the statement he made on oath was not a false statement," which is only another way of saying that he may prove that the pardon was in fact not forfeited. The learned Judge thereby in effect says that the question may be re-opened. Chatterjee J. in the same case says, "It was for the Committing Magistrate to decide this question (*i.e.*, the question of forfeiture). . . . I say this with this qualification that this is only for the purpose of the commitment, and it is open to the accused to show before us in this Court that the statements which are alleged to be false are true in fact," which I take to mean that the Magistrate must come to a finding on the question of forfeiture before he can commit to the sessions, that his finding has no effect beyond the proceedings in his own Court, and that the question can be re-opened in the Sessions Court. I consider that not only may the question be re-opened, but the onus is on the Crown to prove that the pardon has been forfeited.

Now, assuming that the procedure adopted was not quite correct in that evidence should have been taken only as against Shashi in the first instance, and only on the preliminary plea, there is no reason to suppose that any of the accused has been in any way prejudiced.

The argument that it was for the Judge and not

(1) (1910) I. L. R. 37 Calc. 845.

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the Jury to decide whether the pardon was forfeited, is not supported by section 298 (*1*) (*c*) of the Code of Criminal Procedure. That clause refers only to a finding on a question of fact which it is necessary to prove to make other evidence admissible. Here the question of forfeiture of the pardon was important not for the purpose of making other evidence admissible, but for the purpose of determining whether the trial could at all continue as against Shashi. That was a question of fact for the Jury.

As regards the arguments that the learned Judge misdirected the Jury, it is sufficient to say that no passage in the charge has been pointed out, which justifies the suggestion.

I agree that the appeal should be dismissed.

E. H. M. *Appeal dismissed.*

PRIVY COUNCIL.

*P.C.** 1914

Oct. 27, 28 ; *Dec.* 2.

HARI KISHEN BHAGAT

v.

KASHI PERSHAD SINGH

(AND ANOTHER APPEAL CONSOLIDATED).

[ON APPEAL FFOM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Hindu Law—Alienation by widow—Mortgages executed with alleged consent of reversioners—Nature of proof required of consent which must be established by positive evidence—Absence of proof of legal necessity—Presumption afforded by consent of reversioner.

In this appeal which arose out of suits to recover property mortgaged by a Hindu widow it was *held* (affirming the decisions of the Courts in India), that the part taken by the reversioners with respect to the mortgages in question did not, under the circumstances, amount to a consent to bind

**Present*: LORD DUNEDIN, LORD SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

their interests. When a "stringent equity" arising out of an alleged consent by reversioners is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests; and that such consent should not be inferred from ambiguous acts, or be supported by dubious oral testimony such as appeared to have been relied upon in this case.

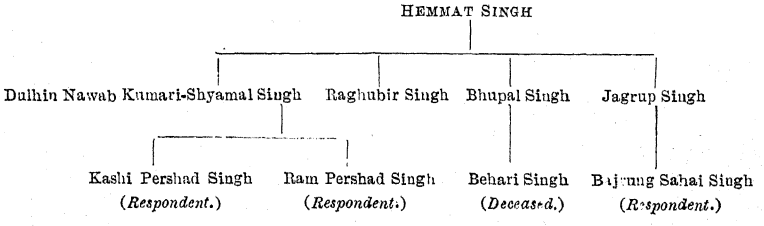
Jiwan Singh v. *Misri Lal* (1), per Lord Hobhouse, referred to.

CONSOLIDATED Appeal 74 of 1912 from a judgment and decree (11th March 1909) of the High Court at Calcutta which affirmed a judgment and decree (22nd June 1906) of the Subordinate Judge of Monghyr.

The defendants were appellants to His Majesty in Council.

The only question for determination on this appeal was as to whether the purchase by the appellant Hari Kishen Bhagat of the lands in suit gave him an absolute title therein or only an estate for life of a Hindu widow.

The facts of the case were that Shyamal Singh was the owner of a four annas share of a mokurari tenure consisting of five mouzahs with kamat lands the subject-matter of the two suits which gave rise to the appeal. He died in 1842 leaving Dulhin Nawab Kumari his widow and sole heiress who succeeded to his estate. The pedigree of his family so far as now material was as follows:—



On 26th November 1877 Dulhin Nawab Kumari mortgaged 1, 2 and 3 of the properties in suit to Hari

(1) (1895) I. L. R. 18 All. 146; L. R. 23 I. A. 1, 4.

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Kishen Bhagat for Rs. 950. The mortgage was witnessed by Raghubir Singh, who was at that time the sole reversionary heir of Shyamal Singh, and by Behari Singh, and was signed on behalf of the widow, the mortgagor, by the respondent Bajrung Sahai Singh.

On 11th July 1882 the widow mortgaged 1, 4 and 5 of the properties in suit to Hari Kishen Bhagat to secure a further loan of Rs. 1,775. And on 10th July 1889, she executed a zurpeshgi lease to Hari Kishen in respect of properties 2, 3, 4 and 5 of the properties in suit for eleven years in consideration of an advance of Rs. 1,250.

On 8th May 1893 Hari Kishen Bhagat brought a suit on the mortgage of 26th November 1877 against Dulhin Nawab Kumari, in which on 14th July 1893 he obtained a decree under which he brought properties 1, 2 and 3 to sale and purchased them on 12th February 1894 for Rs. 2,550: and on 19th February 1897 he brought a similar suit on the mortgage of 11th July 1882, obtained a decree on 23rd March 1897, under which on 13th September 1897 he brought to sale properties 4 and 5 and purchased them for Rs. 2,000 Both these suits were brought in the Court of the Subordinate Judge of Monghyr; they were both undefended, and none of the reversioners were parties to them.

Dulhin Nawab Kumari died in 1900; and on 14th and 16th December 1904 respectively the present suits were filed the former by the respondent Bajrung Sahai Singh for a one-third share of the properties, and the latter by the respondents Kashi Pershad Singh and Ram Pershad Singh, sons of Raghubir Singh for a two-third share. The defendants in the former suit Hari Kishen Bhagat (the first appellant) and his two sons Kedaru Bhagat and Mahabir Bhagat, Kashi Pershad Singh, and Ram Pershad

Singh as the persons claiming the other two-thirds of the properties, and the zamindar, Raja Ram Narayan Singh, as the superior landlord: and the defendants in the latter suit were the appellants, Bajrung Sahai Singh, and the said zamindar.

The plaintiffs claimed as the reversionary heirs of Shyamal Singh on the death of Dulhin Nawab Kumari, and they alleged in their plaints that the mortgages and other transactions by her were not executed for legal necessity, and that the purchases by Hari Kishen Bhagat, therefore, conveyed to him only a life interest in the properties in suit which was determined on the widow's death.

The defence set up by Hari Kishen Singh in each case was that the loans and advances taken by the widow (the mortgagor) were for legal and valid necessities, and that the transactions had been entered into by her with the knowledge, approval and consent of the then reversionary heirs of Shyamal Singh; he claimed therefore that he had acquired an absolute estate in the properties, and that the money covered by the zurpeshgi lease was still due and unpaid.

The Subordinate Judge held that by the mortgages only the limited interest of the widow was mortgaged, that there had been no such legal or valid necessity for the loans and advances taken by her as would bind the reversioners after her death; that the attestations of the reversioners were only a recognition that she had pledged her widow's estate; and that even if the purposes to which some of the money had been applied were necessities, Hari Kishen Bhagat had been sufficiently recouped by the income of the properties covered by the zurpeshgi lease. The Subordinate Judge, therefore, held that all that passed to Hari Kishen Singh under the sales in execution of the mortgages decrees was Dulhin Nawab Kumari's

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limited interest as a Hindu widow which came to an end on her death.

On appeal, the High Court (LALMOHAN DOSS AND RICHARDSON JJ.) held that no legal or valid necessity for the mortgages had been established; that the attestations of the deeds by the reversionary heir did not amount to consent; that even if it did amount to consent on his part to the transactions, it could not be treated as being corroborative evidence of legal necessity inasmuch as there was no other independent evidence of such necessity; and that consent to such a transaction by the reversionary heir could not validate a mortgage for which no legal necessity had been proved. The High Court also found that the amount received by Hari Kishen Bhagat under the zurpeshgi lease was in excess of that which he could claim as valid charges on the properties. In the result the High Court affirmed the decision of the Subordinate Judge.

On this appeal,

A. M. Dunne, for the appellant, contended that the mortgages were executed with the approval and consent of the reversionary heirs, and bound them and their successors in interest; and such approval and consent to the transactions were of themselves evidence rendering proof of legal necessity unnecessary. The consent of the next reversioner raised a presumption in favour of the propriety of an alienation by the widow, which unless fraud was shown would not be set aside; and such consent even given after an alienation had been made would validate it. In the first mortgage the then next reversioner signed on behalf of the mortgagor, and both were signed or attested by other reversioners some of whom were the present claimants. The second mortgage was given to pay off the interest on the first mortgage. Reference was

made to *Collector of Masulipatam* v. *Cavaly Venkata Narainapah* (1), *Raj Lukhee Debea* v. *Gocool Chunder Chowdhury* (2), *Bajrangi Singh* v. *Manokarnika Baksh Singh* (3), [LORD DUNEDIN referred to *Muirhead* v. *Muirhead* (4), and LORD SHAW to *Sham Sundar Lal* v. *Achhan Kunwar* (5).] The doctrine of the consent of the next reversioner has been held by the High Court in the present case [see *Hari Kissen Bhagat* v. *Bairang Sahai Singh* (6)] to apply only to an out-and-out sale and not to an alienation by mortgage, it being said that the doctrine of consent only applied to cases where the widow alienated the whole of her estate, and there was acceleration of the succession, and not where she alienated only a portion of it. But that decision was in fact the cause of a reference to a Full Bench of the High Court which did not agree with it, but held that the doctrine of consent by a reversioner applied to the case of a mortgage: *Debi Prosad Chowdhury* v. *Golap Bhagat* (7). It was submitted that consent had been established on the evidence, and that an absolute title passed to the appellant in the properties by the execution sales under both mortgage decrees. In any case the appellants were entitled to their rights under the zurpeshgi lease if any of the money advanced had been applied for legal necessities. The advances were taken by the widow to meet the expenses of pilgrimages, *shradhs* and other religious undertakings by her and to meet other necessary expenses.

[LORD DUNEDIN said there was no case made out except as to the first mortgage, and asked counsel for

(1) (1861) 8 Moo. I. A. 529, 550.
(2) (1869) 13 Moo. I. A. 209, 228.
(3) (1907) I. L. R. 30 All. 1; L. R. 35 I. A. 1.
(4) (1890) L. R. 15 A. C. 289, 300.
(5) (1898) I. L. R. 21 All. 71; L. R. 25 I. A. 183.
(6) (1909) 13 C. W. N. 544, 548.
(7) (1913) I. L. R. 40 Calc. 721.

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the respondents to confine his argument to that mortgage only.]

Lowndes, for the respondents (other than the zamindar respondent), contended that the decisions of the Courts below were right in holding that only the limited estate of a Hindu widow passed to the appellant by the sale in execution of the decree on the first mortgage; in fact all that was sold was the right, title and interest of the widow, and that was determined on her death. The concurrent decisions of the Courts below had disposed of the question of legal necessity. The doctrine of acceleration of the estate applied in the case of an out-and-out sale by the widow with the consent of the next reversioner, but not where she gives only a mortgage, in which case it is submitted the mortgage would not. even with the consent of the reversioners, be binding as a surrender of the estate. Reference was made to *Behari Lal* v. *Madho Lal* (1), and *Raj Lukhee Debea* v. *Gocool Chunder Chowdhury* (2). On the question of what proof was necessary to establish the consent of the reversioners, *Jiwan Singh* v. *Misri Lal* (3) and *Sham Sunder Lal* v. *Achhan Kunwar* (4) were cited. According to these cases there was here not sufficient evidence of consent by the reversioners The attestations of the mortgage and the signing of the widow's name thereon by the then sole reversioner was not intended to, and, under the circumstances of the case, could not validate the mortgage, as a mortgage of anything more than the widow's interest in the properties, and in any event such attestations and signature could not bind the interest of Raghubir's sons the respondents Kashi

(1) (1891) I. L. R. 19 Calc. 236; L. R. 19 I. A. 30.
(2) (1869) 13 Moo. I. A. 209, 228.
(3) (1895) I. L. R. 18 All. 146; L. R. 23 I. A. 1.
(4) (1898) I. L. R. 21 All. 71, 81; L. R. 25 I. A. 183, 188, 189.

Pershad and Ram Pershad Singh. If the appellant desired to obtain a decree on the mortgage which would be binding on the reversioners, he should have joined them as parties to the mortgage suit.

Dunne replied.

The judgment of their Lordships was delivered by

Dec. 2.

Mr. AMEER ALI. The question for determination in these appeals relates to the validity, as against the reversioners, of certain sales held in execution of decrees obtained on mortgages effected by a Hindu widow, who had succeeded to her husband's estate on his death without leaving any issue. Shyamal Singh, the husband, died in 1842, and the widow, Dulhin Nawab Kumari, held the properties which form the subject of the present litigation until the transactions the validity of which is challenged in these suits.

The first mortgage was executed by Nawab Kumari in favour of the defendant, appellant, on the 26th of November 1877 in respect of three of the properties in her possession. On the 11th of July 1882 she mortgaged the rest of the properties to Bhagat for a further loan, and in 1889 she gave him what is usually called in India a *ticca pottah* of the shares of Shyamal Singh in all the mouzahs save one. Under this usufructuary lease the defendant obtained possession of the shares covered by it.

In 1893 Bhagat brought a suit against Nawab Kumari on the mortgage of 1877 and in execution of the decree on that bond purchased the three properties to which it related. In 1897 he obtained a decree on the bond of 1882, in execution of which he himself purchased again the remaining properties held by the widow. He thus obtained possession of all the shares in the different villages which Nawab Kumari had inherited from her husband for a widow's estate.

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Nawab Kumari died in 1900, and the plaintiffs, who are Shyamal Singh's brothers' sons, and whose reversionary right to his estate, though questioned in the first Court, is not disputed now, brought the present suits to recover possession of the properties held by Bhagat under the execution sales of 1893 and 1897, their main contention being that neither the mortgages executed by Nawab Kumari nor the sales thereunder affected more than her interest which ceased on her death.

Hari Kishen Bhagat is the principal defendant, but his sons have been impleaded in both actions, as they are joint in estate and living in commensality with him, and are, therefore, necessary parties.

The main defence to the plaintiffs' claims was that the mortgages were effected by the widow for valid and legal necessity under the Hindu law, and, further, that they were concurred in by the reversioners, and that consequently the defendants by virtue of the sales in question acquired the interests of the widow as well as theirs. It is to be remarked that in neither of the mortgage suits were the reversioners made parties.

At the time when the bond of 1877 was executed the nearest reversioner to Shyamal Singh was his sole surviving brother, Raghubir Singh. After him stood Raghubir's sons, of whom there were several, and the sons of two other brothers, Bhupal and Jagrup, who were dead at the time. Among these nephews of Shyamal Singh the names of Behari, the only son of Bhupal, and of Bajrung Sahai, a son of Jagrup and a plaintiff in one of the present actions, should be particularly mentioned, as they figure in the transactions in question.

In the instrument of 1877 the name of the widow is written by Bajrung Sahai Singh. He also appears

to have purchased the stamp paper on which the bond is inscribed. Among the witnesses to the document are Raghubir and Behary.

The name of the widow in the mortgage of 1882 appears to be written by Behari Singh, and one of the witnesses to this bond is Bajrung Sahai. On the lease of 1889 Nawab Kumari's name is written by Modenarain, a son of Raghubir, and the witnesses are Ram Parshad, another son of Raghubir, Bishan Parshad, one of the sons of Behary, and Bajrung Sahai, who also appears to have identified the lady to the Registrar. Both the Courts in India have found that so far as the *ticca pottah* of 1889 is concerned, the debt contracted thereunder has been satisfied out of the usufruct of the properties covered by the lease.

The points for determination in these appeals depend on the transactions of 1877 and 1882 respectively. The law relating to the dealings of a Hindu widow with her husband's estate which devolves on her in default of issue is now too well settled to need a prolonged consideration. To be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow or an alienation effected by her can be supported only by proof *aliunde* that such debt was contracted or such alienation was made for valid and legal necessity, and the onus of establishing such necessity rests heavily on the person who claims the benefit of transactions with a Hindu widow or other females taking similar estates. The requirement of the law may, however, be fulfilled by proving the consent or concurrence of the reversioners to or in the transactions.

In the present cases the Trial Judge in a careful and well-considered judgment held that the defendants had failed to prove any valid and legal necessity for the mortgages executed by the widow. This

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view has been affirmed on appeal by the High Court of Calcutta, and there being thus a concurrent finding of fact by the two Courts in India, that subject is now out of the region of discussion. Both the Courts have further held in effect that the part taken by the reversioners with respect to the transactions in question did not amount to a consent to bind their interests. In view of the facts and circumstances of the case, their Lordships have no hesitation in expressing their concurrence with the conclusion at which the Courts in India have arrived. The Trial Judge has carefully examined the phraseology of the two instruments, and he is of opinion that their language is fully consistent with the fact that the interest of the widow alone was intended to be charged. Nor is there anything to show that the reversioners who helped her to raise the loans understood it otherwise. There is no evidence that they benefited from the transactions, or that so far as they were concerned there was any need for the mortgages. Their Lordships think that when a "stringent equity," to use Lord Hobhouse's expression in the course of the argument in *Jiwan Sing* v. *Misri Lall* (1) arising out of an alleged consent by the reversioners is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests; and that such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony such as appears to have been relied upon in this case.

In *Raj Lukhee Debia* v. *Gokool Chunder Chowdhry* (2) this Board refused to affirm the proposition that mere attestation by a relative necessarily imports

(1) (1895) I. L. R. 18 All. 146; L. R. 23 I. A. 1, 4.

(2) (1869) 13 Moo. I. A. 209, 228.

concurrence, and they added that when the consent of the husband's kindred is relied upon for the validity of alienations effected by the widow "the kindred in such case must generally mean all those who are likely to be interested in disputing the transaction. At all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu law." The observations of the Board in that case seem to their Lordships to apply with particular force to the facts of the present case.

On the whole, their Lordships are of opinion that the Judgments appealed from are right and ought to be affirmed, and that these appeals ought to be dismissed with costs. And they will humbly advise His Majesty accordingly.

J. V. W. *Appeals dismissed.*

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the 1st and 2nd respondents, in both appeals: *Theodore Bell & Co.*

APPELLATE CIVIL.

Before Holmwood and Mullick JJ.

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Jan. 13.

EAST INDIAN RAILWAY COMPANY

v.

CHANGAI KHAN.*

Remand—New case—Second appeal—Finding of fact—High Court, power of —Silk—Railway Company, liability of—Railways Act (IX of 1890), s. 75—Practice.

A new case cannot be made on behalf of the plaintiff on remand.

After there has been a decision of fact in the two Courts of original and first appellate jurisdiction, the High Court cannot entertain a second appeal upon any question as to the soundness of findings of fact by the lower Appellate Court. If there is evidence to be considered the decision of the Second Court, however unsatisfactory it might be, when examined, must stand final.

Ramratan Sukal v. *Nanlu* (1) referred to.

The question whether silk in manufactured or unmanufactured state is to be treated as silk is a question of fact.

Brunt v. *Midland Railway Company* (2), *Hiatunnissa* v. *Kailash Chandra Saha* (3), *Lakhmidas Hira Chand* v. *The Great Indian Peninsular Railway* (4), *Saminadha Mudali* v. *The South Indian Railway Co.* (5), *Pundalik Udaji Jadhav* v. *S. M. Railway Co.* (6) referred to.

SECOND APPEAL by the East Indian Railway Company, the defendants. This appeal arose out of a suit for recovery of the price of articles contained in a lost packet booked from Bombay to Bankipore.

* Appeal from Appellate Decree, No. 1120 of 1912, against the decree of Ibrahim Ahmed, Subordinate Judge of Bankipur, dated Feb. 15, 1912, confirming the decree of Kali Kumar Sarkar, Munsif of Patna, dated Nov. 30, 1910.

(1) (1891) I. L. R. 19 Calc. 249.
(2) (1864) 33 Exch. 187.
(3) (1905) 16 C. L. J. 259.
(4) (1867) 4 Bom. H. C. 129.
(5) (1883) I. L. R. 6 Mad. 420.
(6) (1909) I. L. R. 33 Bom. 703

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Amongst other things the lost packet contained handkerchiefs which were described as "fancy silk-handkerchiefs". The Railway Company contended that in as much as the packet contained silk worth more than Rs. 100, the Railway Company was not liable, as the packet was not insured under section 75 of the Railways Act. The first Court gave a modified decree, *i.e.*, it held that the Company was not liable for the loss of the silk handkerchiefs, but it was liable for the loss of other articles contained in the lost packet. Both sides appealed, but their appeals were dismissed by the Subordinate Judge. The Railway Company then appealed to the High Court mainly on the ground that the Company was not liable for any of the articles contained in the lost packet.

Teunon J. (sitting alone) agreeing with the contention of the Railway Company, remanded the case to the lower Court for a fresh finding as to the particular items of silk handkerchiefs and their respective values directing that the Subordinate Judge, in the first Court of appeal, should come to a finding on the following issue, namely, what is the aggregate value of the handkerchiefs in which, on the evidence adduced, it may be found that the value of silk exceeds the value of the other materials.

The finding on the issue was against the Railway Company. Teunon, J. did not care to hear the appeal. The matter, therefore, was placed before the Chief Justice who referred it to the Bench presided over by Holmwood and Mullick JJ.

Mr. S. R. Das (with him *Mr. G. B. Macnair* and *Babu Ambica Chowdhry*), for the appellants, submitted on the authority of *Hiatunnissa* v. *Kailash Chandra Saha* (1) that the whole case was opened up before

(1) (1905) 16 C. L. J. 259.

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their Lordships and it was necessary to see whether or not the remand order was bad. The finding of the original Court regarding silk was conclusive and could not be reopened. The High Court could not interfere with the finding of fact: *Ramratan Sukal* v. *Nandu* (1).

Lakhmidas Hira Chand v. *The Great Indian Peninsular Railway* (2) and *Samivada Mudali* v. *The South Indian Railway Company* (3) are distinguishable and do not apply to the facts of the present case. The lost packet containing, as it did, silk articles worth more than rupees one hundred, should have been insured, but, not being insured, the plaintiff could not make the Railway Company liable for anything contained in the said packet.

Moulvi Mustafa Khan, for the respondent, submitted that when the article was lost the Company was liable. The Court could not decide the case on the word 'fancy' only. We gave evidence that the handkerchiefs were not silk handkerchiefs at all, and even if there was any silk, the quantity of silk was very little in those handkerchiefs. Onus was on the Company to show that there was preponderance of silk. Insurance was not necessary. The Company should have taken proper care.

Mr. Das was not called upon to reply.

HOLMWOOD AND MULLICK JJ. This second appeal arises out of a suit brought by the plaintiffs against the East Indian Railway Company for the loss of a certain parcel consigned to the company for conveyance from Bombay to Bankipur the value of which is stated to be Rs. 516-5-7½ pies. After a prolonged correspondence about the claim the plaintiffs submitted

(1) (1891) I. L. R. 19 Calc. 249. (2) (1867) 4 Bom. H. C. 129.
(3) (1883) I. L. R. 6 Mad. 420.

to the defendants a detailed statement of the goods in the parcels, and it appears from that statement that fancy silk handkerchiefs of the value of Rs. 138-2 annas had been lost with the parcel. The defendants thereupon denied their liability relying on section 75 of the Railways Act, IX of 1890, and Schedule II thereto annexed. The Munsif and the Subordinate Judge in concurrence held that the defendants were not liable for the silk inasmuch as it had not been declared or insured. But they held that the plaintiffs can recover the value of the other goods contained in the parcel, which did not appear to have come within Schedule II of the Act.

The second appeal came before Mr. Justice Teunon sitting alone, and he was of opinion, and rightly in our view, that the whole case of the plaintiffs must fail if scheduled goods of the value of over 100 rupees were in the parcel and for this reason that section 75 of the present Act, differing in that respect from the former Act, says that the Railway Administration shall not be responsible for the loss, destruction or deterioration of the parcel and not of the articles mentioned in the Schedule II. It is therefore clear that if this parcel contained silks in a manufactured or unmanufactured state and whether wrought up or not wrought up with other materials of the value of Rs. 100, the Railway Company are not responsible for anything contained in the parcel; and that was the sole ground upon which the Railway Company came before Mr. Justice Teunon in appeal. Mr. Justice Teunon, as we have seen, decided that point in favour of the Railway Company, and there we should have thought would have been an end of the matter, inasmuch as the plaintiffs did not file any cross-objection and did not say anything about the question of silk. But Mr. Justice Teunon appears to have thought that the company could not recover

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anything unless there really was silk to the value of over 100 rupees in the parcel, and he therefore remanded the case to the lower Court for a fresh finding as to the particular items of silk handkerchiefs and their respective values directing that the Subordinate Judge in the first Court of appeal should come to a finding on the following issue, namely, what is the aggregate value of the handkerchiefs in which on the evidence adduced it may be found that the value of silk exceeds the value of the other materials.

The learned Subordinate Judge on remand expressed himself wholly unable on the evidence to decide this issue. But he said that he was satisfied with the statement in the plaint that the silk handkerchiefs were worth 91 rupees and the other handkerchiefs which were not silk were worth 42 rupees and odd, and this was a sufficient basis for making a new decree.

It is there that the principal question in this appeal arises. It is obvious even if the remand which was made was a competent remand with which we shall deal presently, the Subordinate Judge could not make a new case for the plaintiffs. The finding of fact of the first two Courts before remand was at any rate conclusive that the plaintiffs had admitted to the Railway Company that they had consigned 138 rupees silk goods for them to carry, and the only question that was remanded was, what was the proportion of silk in each kind of handkerchief so as to show whether the aggregate amounted to 100 rupees or not. We are of opinion, relying on the decision in *Hiatunnessa Bibi* v. *Kailash Chandra Saha* (1), that the remand itself was incompetent and that we in dealing with it as a Divisional Bench are bound to treat the case as coming before us on appeal from the Subordinate Judge who heard the first appeal. It is

(1) (1905) 16 C. L. J. 259.

unnecessary to go into the considerations which induced the late Chief Justice and Mr. Justice Mitra to hold in the similar case that the remand was incompetent. It is clear as matter of principle that after there has been a decision of fact in the two Courts of original and first appellate jurisdiction the High Court cannot entertain a second appeal upon any question as to the soundness of findings of fact by the lower Appellate Court. If there is evidence to be considered the decision of the second Court, however unsatisfactory it might be when examined, must stand final. These are the words of their Lordships of the Judicial Committee in the well known case of *Ramratan Sukal* v. *Nandu* (1).

It was argued that Mr. Justice Teunon remanded the case on finding that the onus had been wrongly placed and that that was a point of law. But we find that he does not specifically find there was any misplacing of the onus. He says the Courts below, while placing upon the plaintiffs the whole burden of proof, have proceeded, it appears, solely upon the description fancy silk contained in the statement of claim, and he concludes by saying, even if the Courts below were right in throwing the whole burden on the plaintiffs, in view of the expression of opinion to be found in the cases which we shall presently deal with, the findings at which they had arrived is not sufficient; and why is it not sufficient? Because the possibility of equality in value has been overlooked and also the details of the value of each silk handkerchief have not been gone into. Now, these points surely come within the dictum of their Lordships of the Judicial Committee as to the soundness of the findings of fact rather than as to the findings of fact themselves.

(1) (1891) I. L. R. 19 Calc. 249.

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The learned Munsif found as a fact that from the list supplied by the plaintiffs to the defendants it appears that the lost box contained silk handkerchiefs worth more than 100 rupees. That *primâ facie* clearly relieved the defendants from any burden. To avoid their liability to make a declaration and to insure the goods the plaintiffs stated that the handkerchiefs were not real silk but were known as such in the market, though they sold for no more than 5 or 6 pice each, while real silk handkerchiefs sold at Rs. 12 or 13 a dozen. They did not ask the Court to go into the question of whether there were so many at 15 annas and so many at higher price so that the aggregate of the real silk would not amount to 100 rupees. They took the general statement that fancy silk meant sham silk. They then produced a witness with samples of handkerchiefs which they alleged were similar to the lost hankerchiefs; and upon this evidence and relying on the case *Lakhmidas Hira Chand* v. *The Great Indian Peninsular Railway*(1), and on the case of *Saminadha Mudali* v. *The South Indian Railway Company* (2), they sought to argue that such handkerchiefs could not be considered as silk within the meaning of the Act. The learned Munsif then said, in deciding whether a particular article when wrought up with other article is to be regarded as silk or not within the meaning of the Railway Act, the proper test to apply, according to those decisions, was to ascertain whether the value of the silk was more than half of the whole article. He then gives his finding, "the evidence placed before me is not sufficient to show that the price of the silk contained in the handkerchiefs, if any, was less than half that of the whole article." It is argued that if we deal with this finding on the strictest mathematical principles it is not the finding

(1) (1867) 4 Bom. H. C. 129. (2) (1883) I. L. R. 6 Mad. 420.

that he set himself to find, namely, that there was more than half of the value in silk in the handkerchiefs. But having regard to what he sets out to be the necessary finding, it is obvious that he intends to find that there is a sufficient preponderance of silk in the handkerchiefs to bring them within the rulings he cites; and he fortifies his finding by saying that they go by the name of silk in the market and are sold as such; and this brings us to the consideration of the English case on which both the cases in India relied. It is the case of *Brunt* v. *Midland Railway Company* (1), where Baron Pollock clearly says, that the question whether silk in manufactured or unmanufactured state is to be treated as silk within the meaning of the English Act, the words in which are precisely similar to those in Schedule II of the Indian Act, is a question of fact which very properly might be left to a jury. When it is left to a Judge, the Judge must decide where the line should be drawn, that is to say, some test must be taken by the Court as to whether the case came within the definition or not. The line shifted according to the circumstances but the question which a Judge of fact has to answer is not where to draw the line, but whether the particular article before him is within the line; and he found as a fact that in this particular case that was before him the silk did come within the line. In the judgment by another Judge, Baron Pigott, who also treats it as a simple question of fact it is stated that in that case the ingredients of silk amounted to more in proportion and value to any other article. As a matter of fact it was a question of two pence in two shillings so that it was very near the dividing line of half and half.

We do not, and indeed we cannot, bind all Courts to follow the exact test which was adopted by the

(1) (1864) 33 Exch. 187.

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Madras Court in one case and by the Bombay Court in another. Each case must depend upon its own circumstances. Where a Court has adopted a fair test and where upon that test it has found that the article is silk within the meaning of the section, that is in our opinion a clear finding of fact and the Court cannot go behind it in second appeal. The Subordinate Judge, though he has said less, has put the matter even more strongly. He says the plaintiffs have failed to prove that the handkerchiefs were not silk handkerchiefs or rather that they contained less silk than cotton. This is sufficient to bring the case within the schedule, and we are therefore of opinion that in second appeal we cannot go behind that finding.

Then comes the question whether the decree made in favour of the plaintiffs with regard to the other articles can stand. We have already indicated that we agree with the view taken by Mr. Justice Teunon that it cannot, and we are fortified in that opinion by the clear decision in the case of *Pundalik Udaji Jadhav* v. *The Agent, S. M. Railway Company* (1).

The result is that the appeal is decreed and the plaintiff's suit is dismissed with costs in all Courts.

S. K. B. *Appeal allowed.*

(1) (1909) I. L. R. 33 Bom. 703.

PRIVY COUNCIL.

RAVANESHWAR PRASAD SINGH

v.

BAIJNATH RAM GOENKA.

P.C.*

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[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Sale for arrears of revenue—Setting aside sale—Defect in specification of property to be sold in notification of sale—Ijmali share in property where there are many separate accounts opened—Revenue Sale Law (Act XI of 1859) ss. 6, 10, 11, 13, 33—Inadequacy of price caused by want of proper specification of the property for sale.

The *ijmali* or joint share in a mahal in which 148 of the owners of specific but undivided shares had obtained from the Collector separation of accounts under sections 10 and 11 of Act XI of 1859 was put up to sale for arrears of revenue, and purchased by the respondent. In the notification under sections 6 and 13 of the Act the specification of the share to be sold was in the following terms :—" *Ijmali* share which cannot be specified excluding the separate accounts, number—." Then followed a list of the 148 separate accounts referred to, and at the end it was stated that " All other shares besides that specified are excluded from the sale." And the entry in column 5 (the specification column) was " The *ijmali* share cannot be particularised owing to separate accounts having been opened. The shares to be sold are those given in a separate sheet after excluding the shares in respect of which the separate accounts have been opened." In a suit to set aside the sale :—

Held (reversing the decision of the High Court), that the notification of sale was insufficient and irregular, and not in compliance with the requirements of the law. Each case must depend on its own particular facts ; and what had to be considered was whether, having regard to all the circumstances, the specification was sufficiently clear to induce likely buyers to appear and bid at the sale. It was not enough that they might go and obtain the requisite information from the Collector's office : the particulars in the notice should be sufficient in themselves to tell purchasers what they were invited to bid for.

* *Present* : LORD DUNEDIN, LORD SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

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Held, also, on the evidence that the property had been sold at an inadequate price, and that the lowness of the price was due to the defectiveness of the specification of the property to be sold in the notification of sale, which was not merely an irregularity but a defect that rendered the sale void.

APPEAL 21 of 1912 from a judgment and decree (1st May 1907) of the High Court at Calcutta which reversed a judgment and decree (30th June 1904) of the Subordinate Judge of Monghyr.

The plaintiffs were appellants to His Majesty in Council.

The question for determination on this appeal was whether the appellants were entitled to set aside a sale of a certain share in a zamindari for arrears of revenue and to recover possession of the lands of which the sale had deprived them, with mesne profits.

The property sold was the *ijmali* (joint) or residuary share of a zamindari known as the 15 annas, 6 dams share of Pargana Bisthazari, bearing touzi No. 336 in the Collectorate register, and consisting of 360 villages.

The zamindari had been broken up by constant subdivisions caused by the opening and creation of separate accounts under Act XI of 1859, in favour of transferees and purchasers of the interests of individual co-sharers in specific villages or groups of villages forming part of the estate, the result of which was a constant condition of change and uncertainty in the zamindari, and especially in the *ijmali* or residuary share. At the date of the sale there were 148 of such separate accounts.

The sale took place on 9th September 1901, and the property was purchased by Baijnath Ram Goenka, the first respondent, for Rs. 33,500.

In August 1901 a sum of Rs. 604-9-4 was alleged to be due to Government as arrears of revenue in respect

of the *ijmali* share of the mahal. A notice dated 7th August 1901 was published in the "Calcutta Gazette" under sections 6 and 13 of Act XI of 1859, to the effect that the *ijmali* share of the mahal would be sold on 9th September 1901 for recovery of the arrears of revenue due. In the 5th column of the notice it was stated that "the *ijmali* share could not be specified." It excluded 148 separate accounts which were specified, and at the bottom of the list it was stated that "all other shares besides that specified are excluded from the sale." In the 7th column of the notice it was stated that the sudder jumma of the share to be sold was Rs. 2,615-6.

By a sale notification dated 6th August 1901, also issued under sections 6 and 13 of Act XI of 1859, it was stated that the *ijmali* share could not be particularised owing to separate accounts having been opened.

On 9th September 1901 the first appellant petitioned the Collector for the postponement of the sale, on the ground (*inter alia*) that the extent of the *ijmali* share was not known, and he offered to pay the arrears due in order that the sale might be stayed, but his application was rejected.

The property was sold as above stated, and on 14th March 1902 a certificate of sale of the *ijmali* share was granted to the first respondent; and on 15th May 1902 he claimed and obtained possession of 44 villages in pargana Bisthazari as being included within the *ijmali* share purchased by him. Amongst the villages were included two, Matasi and Mirzaganj, which were not a part of the *ijmali* share, and which belonged to certain of the appellants and respondents (plaintiffs in the present suit).

On 26th November 1902 the first respondent applied under Bengal Act VII of 1876 to be registered as the proprietor of the 44 villages by reason of his

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purchase and it was then found and decided that only 31 out of the 44 villages were included within the *ijmali* share purchased by him.

The owners of the *ijmali* share at the time of the sale were the appellants, and the respondents 14 to 19. On the 24th December 1901, the first appellant filed an appeal to the Commissioner of the Bhagalpur Division against the sale, but the appeal was dismissed on 12th February 1902.

On 30th September 1902 the appellants and the respondents 2 and 14 to 19 instituted against Baijnath Ram Goenka and other defendants, the suit out of which the present appeal arose. The plaintiffs contended that the sale of the *ijmali* share was on various grounds illegal; and prayed that the sale should be set aside and that possession of the respective plaintiffs' shares in the various mouzas, which then constituted the *ijmali* share, together with mouzas Matasi and Mirzaganj should be awarded to them with mesne profits.

The defence of the defendant Baijnath Ram Goenka was (*inter alia*) that the sale was valid and legal.

The only issues material to this report were—(7) was the notice under section 6 of Act XI of 1859 legal, and did it contain the necessary specification and descriptions, and were the details mentioned in it correct? (9) was the sale of the *ijmali* estate illegal and void on account of the alleged illegalities and irregularities, and was it sold for an adequate price? and (11) are the plaintiffs entitled to have the sale set aside, and to recover possession of the properties claimed.

The Subordinate Judge held that the mouzas Matasi and Mirzaganj were not included in the *ijmali* share; that under Act XI of 1859 and the rules of the Board of Revenue there had been no proper specification

in the notices of the property to be sold; that the specification should be such that intending bidders at the sale might be able to know for what they were bidding; that the notices of sale did not enable the bidders to know what properties were comprised in the *ijmali* share; and that though the materials for a clear specification were available to them, the officials had omitted to make such a specification in the notices of sale as was required by the law. The Subordinate Judge came to the conclusion that the defect in the notices issued under sections 6 and 13 of Act XI of 1859 was fatal to the sale proceedings and rendered them invalid. He further held that the value of the *ijmali* share was between Rs. 1,75,000 and Rs. 2,00,000 which value was not diminished by reason of certain incumbrances alleged by the first respondent to exist on it, and that the inadequacy of price (Rs. 33,500) was in his opinion the direct result of the want of proper specification of the property to be sold in the notices of sale.

The decree was that the sale should be set aside and that possession of the ijmali share with mesne profits should be given to the plaintiffs.

The first respondent appealed to the High Court, and the Appellate Court (Rampini and Sharfuddin JJ.) reversed the decision of the Subordinate Judge, and dismissed the suit with costs. The material portions of their judgment as to the sufficiency of the notice of sale and the alleged inadequacy of price were as follows :—

"The notice in this case, although in it, it was said that the ijmali share could not be particularized, which in our opinion merely meant that the names of the villages of that share could not be readily given in detail, yet as a matter of fact fully explained the share that was to be sold. The vernacular words in column 5 are as follows :—'*Ijmali hissa tasrih nahin ho sakta, kiswaste ke tafriq mauzawar khula hai, baminhai hissa tafriq ba fard alhida*' what this means is that 'as separate accounts

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have been opened village by village, the *ijmali* shares cannot be particularized, except by excluding the separate accounts which are given on a separate sheet of paper.'

"It is impossible we consider for any intending purchaser to justly say that he was misled by this description of what was to be sold. It will be seen that it is described as the *ijmali* share, from which were to be deducted the shares for which separate accounts had been opened, as shown in the separate sheet appended to the notification. The other columns of the notice were fully and correctly filled up. No exception is taken to the entries in any of them. The name of the mahal, its towzi number, the Government revenue of the estate and the proportionate Government revenue of the share to be sold and the amount of the arrears due for that share, are all correctly entered in them. Now, we think that in these circumstances, the notice specified the share to be sold and gave intending purchasers sufficient notice of what was to be put up to auction, for it was perfectly easy to examine the separate sheet and see what was not to be sold, and so to understand that what was to be sold was what remained of the estate . . . . . In support of his argument that where separate accounts have been opened under section 11 of the Sale Act mention of the names of mouzas is necessary, the learned counsel for the plaintiffs has drawn our attention to certain forms of notification under section 6 prescribed by the Board of Revenue.

"But he has conceded that if an entire estate is about to be sold it is unnecessary to specify the mouzas of which it is comprised. Now, if an entire estate can be identified without the names of the villages comprised in it being mentioned in the sale notification we do not see why an *ijmali* estate cannot be identified without mentioning the names of the villages comprised therein. The forms prescribed by the Board of Revenue have not the force of law, and they are simply given in the Board of Revenue's Manual by way of examples, and the Collectors are directed to follow them, "as far as possible," which indicates that these forms in exemptional cases need not be followed.

"The Subordinate Judge has held that the non-specification of the mouzas in the sale-notification was not merely an irregularity but a fatal defect which made the sale a nullity, and the learned counsel for the plaintiffs has also pressed this argument upon us. We are however of opinion that there was no defect in the sale-notification, and that even if there was, it was a mere irregularity which could not have the effect of rendering the sale a nullity. . . . . .

"The next point is whether the property was sold at an inadequate price. . . . . .

"Now, if we bear in mind the fact a property cannot at a forced sale

fetch its full market value, and that the costs of the inevitable impending litigation must be taken into consideration by the purchaser, it will be seen that even if the property sold in this case would have fetched more, if sold at a private sale, yet, it does not necessarily follow that when sold by the Collector for Rs. 33,500, it was sold at an inadequate price. Indeed after the costs of the litigation in which the auction purchaser in this case finds himself involved, are defrayed, it is very doubtful if he will have made a good bargain by his purchase. But the learned Subordinate Judge has in our opinion over-valued the property and it is certainly not worth the lakh and three quarters or two lakhs, which he considers it to be worth. He relies on certain jamabandis, raibandis and oral evidence. We do not attach the same credit to these jamabandis as the Subordinate Judge does, and as for the oral evidence the Subordinate Judge himself says with regard to the plaintiff's witnesses 'no reliance can be placed on their vague statement.' Most of the jamabandis purport to have been prepared by patwaris, who admit that they did not sign them. But even assuming that these jamabandis are to be relied on, as the Subordinate Judge thinks they are, the Subordinate Judge would seem to have fallen into error in deducting the amount of cesses and collection charges after capitalizing the gross income of the *ijmali* share. He should, we think, have deducted these amounts from the gross income and calculated the value at so many years' purchase on the net result."

After a detailed calculation of the value of the property from an examination of the accounts and the particulars of the alleged incumbrances, the judgment continued—

"Hence, though we do not pretend to be able to fix the exact value of the property sold, we are decidedly of opinion that the plaintiffs have entirely failed to show that the sum of Rs. 33,500 bid for it by the defendant is an inadequate price when we take into consideration—(i) the expenses of litigation which the purchaser had inevitably to incur, and (ii) the amount due under the decrees and incumbrances for which the property sold was liable."

On the question whether the evidence showed that the alleged inadequacy of price, assuming it to exist, was due to the want of specification in the notice of sale of the mouzahs of the *ijmali* share, the High Court said :—

"The evidence on this point adduced by the plaintiffs is in our opinion entirely insufficient and unsatisfactory. Several witnesses declare that the

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inadequacy of price was due not to the non-specification of the mouzahs in the sale notification, but to the alleged fact that no notice of sale was ever served at all. The defendant has, however, obtained a certificate of sale (Ex. EE) so that under section 8, Act VII of 1868, no objection on the ground of non-service of the notice of sale can now be urged. Other witnesses say they did not know what was about to be sold and so could not bid. These statements would, however, appear to be shown to be untrue by the inexorable logic of the facts of the sale. The bid-sheet (Ex. 56) discloses that there were 5 bidders, including Government, at the sale. The bidding was brisk as is shown by the number of bids. One bidder made 17 bids, another 18, another 20, and the successful purchaser 22 bids. The agent of the plaintiff No. 1, the Raja of Gidhour, who made 20 bids, bid from Rs. 14,000 up to Rs. 33,000 and the appellant only secured the property by outbidding him by Rs. 500. We cannot suppose that all these bidders cannot have known what they were bidding for, and we are therefore of opinion that in this case there is no satisfactory evidence to show that even supposing the property to have been sold for an inadequate price, which we consider not to have been established, the paucity of price was in any way due to the non-specification of the mouzahs in the notice of sale."

An application having been made on behalf of the plaintiffs for leave to amend the plaint by the withdrawal of the claims to mouzahs Matasi and Mirzaganj, the High Court whilst finding that those claims caused misjoinder of parties and causes of action, held that it was unnecessary to grant the application inasmuch as the suit failed on the merits.

On this appeal,

Sir H. Erle Richards, *K.C.*, and *A. M. Dunne*, for the appellants, contended that the notices of sale were defective and invalid, and therefore afforded no sanction to the sale; that the sale was consequently illegal and void; and that the property had in fact been sold at a grossly inadequate price which was due to, and a direct result of, the defects in the notices of sale. The notices of sale did not conform to the requirements of Act XI of 1859 nor to the rules of the Government regulating such a sale contained in the "Manual of

Revenue and Patni Sales Law," published by the Board of Revenue in Bengal (Ed. 1902) in omitting to specify and particularise the actual properties and shares proposed to be sold. That omission was the cause of the property in suit which was of a value exceeding Rs. 1,20,000 being sold for Rs. 33,500. Reference was made to sections 6 and 13 of Act XI of 1859; the "Manual of Revenue and Patni Sales Law," pages 99, 700, and the form of notification there given; and the Land Registration Act (Bengal Act VII of 1876) section 70; and it was submitted that the notification in the present case was not sufficiently specific in the details of the property. No attempt was made to specify the lands or villages constituting the *ijmali* share which it was proposed to sell. It was quite possible for the Government authorities to specify and particularise what the *ijmali* share consisted of, because the materials and information for that purpose was in their possession in the Collectorate registers. Without any such specification, and having regard to the constant changes which had been taking place in the mahal by reason of the opening of separate accounts, it was impossible, it was submitted, for any one to be certain from the notice what portion of the mahal was comprised within the *ijmali* share, and was being sold. According to the decided cases the question whether the specification is sufficient depends in each case on the terms of the notice of sale, and in the present case they were not sufficient to inform intending bidders with precision what was being sold. There was sufficient evidence on the record that the inadequacy of price was attributable to the defective specification. Reference was made to *Hem Chandra Chowdhury* v. *Sarat Kamini Dasya* (1), *Ismail Khan* v. *Abdul Aziz Khan* (2) a case referred to a Full Bench; and the

(1) (1902) 6 C. W. N. 526. (2) (1905) I. L. R. 32 Calc. 509, 513.

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same case (1) decided by the Full Bench; *Ram Narain Koer* v. *Mahabir Parshad* (2); Act XI of 1859, section 33; and *Gobind Lal Roy* v. *Ramjanam Misser* (3). The judgment of the Subordinate Judge was correct and should be restored.

De Gruyther, *K.C.*, and *B. Dube*, for the respondent, contended that the notification of sale contained all the necessary particulars with sufficient correctness, clearness and detail in accordance with law to enable any one who proposed to bid at the sale to ascertain precisely what property was to be put up for sale; and, mainly for the reasons given by the High Court, that such a defect, if it existed, was merely an irregularity and not a defect which nullified the sale; and that there was no inadequacy of price. Column 5 of the notification excluded all the shares that were not for sale leaving it to be inferred that the rest of the estate, that is the *ijmali* share, was the property for sale. A sale under the Civil Procedure Code required a great many things to be done, and they are all specified, which was not the case with Act XI of 1859: it was allowable, therefore, to infer that unless specified in the Act any particular detail was not essential. The interpretation of section 6 of the Act depended on the registers of estates in the Revenue Office. The "Manual of Revenue and Patni Sales Law," page 74; the Land Registration (Bengal Act VII of 1876) sections 3, 4 and 15; and Bengal Act VII of 1868 (amending Act XI of 1859) section 6 were referred to. As to the inadequacy of price being attributable to such a defect, if it existed, in the publishing or conducting a sale, as want of sufficient specification of the property to be sold, it could not be inferred, but must be proved by direct evidence; and

(1) (1905) I. L. R. 32 Calc. 502, 507.
(2) (1886) I. L. R. 13 Calc. 208, 211, 217.
(3) (1893) I. L. R. 21 Calc. 70; L. R. 20 I. A. 176.

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it was submitted that the evidence in this case was wholly insufficient to show that either the price was inadequate, or that it was less on account of any omission or defect in the specification of the property in the notification of sale. Reference was made to *Ismail Khan* v. *Abdul Aziz Khan* (1), *Dilchand Mahto* v. *Baijnath Singh* (2), *Amirunessa Khatun* v. *Secretary of State for India* (3), and *Nibaran Chandra Chowdhuri* v. *Chiraniib Prasad Bose* (4). On the evidence there was, it was submitted, no inadequacy of price proved. The best evidence of the value of the property was the Road Cess returns under Bengal Act IX of 1880, section 20.

Sir H. Erle Richards, K.C., in reply

The judgment of their Lordships was delivered by

Jan. 19.

MR. AMEER ALI. This is an appeal from a judgment and decree of the High Court of Bengal, dated the 1st of May 1907, and the question for determination relates to the validity of a sale for arrears of revenue held under Act XI of 1859 of a share of an estate called Mahal Bisthazari situated in the district of Monghyr.

The case offers an illustration of the extreme complexity of the land-system existing in Bengal. A 15 annas 6 dams share of Mahal Bisthazari seems to have been in existence as an independent fiscal unit for a considerable time. It includes 360 villages, and in the Collector's register is entered as bearing Touzih No. 336, which marks its position as a separate revenue-paying estate.

As is usually the case in Bengal and elsewhere in India, a large number of persons possess proprietary

(1) (1905) I. L. R. 32 Calc. 502, 503.
(2) (1903) 8 C. W. N. 337, 338, 343.
(3) (1883) I. L. R. 10 Calc. 63.
(4) (1905) I. L. R. 32 Calc. 542.

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rights in this mahal; they own specific shares, some in one village only, others in several villages. Ordinarily the whole estate held in thiswise is liable to be put up for sale for default in the payment of Government revenue. But Act XI of 1859, which lays down the rules for the realisation of the revenue payable to the State, provides (by section 10) that "a recorded sharer of a joint estate held in common tenancy," or (by section 11), "a recorded sharer of a joint share whose share consists of a specific portion of the land of the estate," may apply to the Collector to open a separate account for the payment of his share of the revenue separately from the others. These separate accounts in respect of separate shares ensure that no share of an estate other than the one in respect of which the default had occurred should be exposed to sale (section 13) until and unless the highest offer for that share does not equal the amount of the arrear (section 14), when the whole estate becomes liable to be put up to sale.

In accordance with the provisions of sections 10 and 11 of Act XI of 1859, 148 owners of specific but undivided shares in Mahal Bisthazari applied for and obtained from the Collector separation of accounts. This left, however, a large residue, commonly called the *ijmali* or joint share, the owners of which remained jointly liable for the revenue due in respect thereof.

In August 1901, this *ijmali* share was found to be in arrears for the March and June *kist* or instalment of Government revenue, amounting to Rs. 604, and it was advertised for sale on the 9th September 1901. An application appears to have been made to the Collector for postponement of the sale, which, however, was refused, and the sale was held on the advertised date, when the property was purchased by the defendant-respondent, Baijnath Goenka, for a sum of Rs. 33,500.

An appeal to the Commissioner of the Division, preferred by the owners of the *ijmali* share, under section 25 of the Act, having been dismissed, the plaintiffs brought their suit in the Court of the Subordinate Judge of Monghyr for the annulment of the sale. The grounds on which they base their action are exactly the same as those they urged before the Commissioner. These grounds are set forth with sufficient distinctness in the 18th paragraph of the plaint, sub-clause (*e*), which is in these terms:—

"That the description of the ijmali share given in column 5 of the said notification was incorrect, insufficient, and misleading, and, having regard to the nature of the interest included in the said *ijmali* account and to the fact that it was constantly fluctuating, a fuller and more specific description thereof, with particular reference to the villages and the diverse interests making it up, should have been given, all materials for the same being available to the Collector in his office. The omission to give such detailed description of the ijmali account has largely affected the sale and value of the property sold."

Shortly stated the points at issue resolve themselves into two questions—one of law and the other of fact: (i) Whether, having regard to the purpose in view, the specification of the property in the sale-notification was in accordance with the provisions of the law; and (ii) whether, in case the requirements of the law had not been complied with, the plaintiffs, by reason of the irregularity, had sustained substanial injury.

The Trial Judge found both questions in favour of the plaintiffs. He held in effect that the specification was insufficient and defective, and that in consequence thereof the property was sold at a gross undervalue. He accordingly made a decree annulling the sale. The High Court, on appeal, came to a directly opposite conclusion on both points, and reversing his judgment, have dismissed the plaintiffs' action.

In these circumstances it becomes necessary, in

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their Lordships' opinion, to consider carefully the description or specification which the Trial Judge holds to be insufficient and irregular and which the High Court, on the other hand, regard as sufficiently complying with the requirements of the law.

Act XI of 1859 is a stringent enactment for the realization of arrears of revenue; at the same time it provides certain safeguards for the protection of the interests of the defaulter so that he may not be unnecessarily prejudiced. Among these safeguards are the provisions of sections 5 and 6 for the issue of notifications of sales specifying the properties to be sold, and their due publication in accordance with the law. And an exact compliance with its requirements is considered so important by the Government that the Board of Revenue has issued special rules, with forms of notification necessary in the case of estates or shares of estates advertised for sale. The object of the law as well as of the Board's rules requiring specification of the properties to be sold is clearly to enable likely purchasers among the public to know exactly what was going to be sold, and to ensure thereby reasonable competition. When an estate is advertised for sale it is not difficult to specify it; in the case of shares of estates the work of specification requires care and attention. No hard-and-fast rule can be laid down with regard to its sufficiency, for it must vary according to the facts of each particular case.

In the present case the notification under sections 6 and 13 of the Act was affixed in the Collector's office and in the court of the Judge of the district; and as the revenue payable in respect of the *ijmali* share exceeded Rs. 500, it was also published in *The Calcutta Gazette*, which is the official gazette prescribed in the Act. In this notification, which bears

date the 7th of August 1901, what purports to be a specification of the share to be sold is in these terms: "*Ijmali* share which cannot be specified excluding the separate accounts number—." Then follows a long list of the 148 separate accounts already referred to. And at the end the following words occur: "All other shares besides that specified are excluded from the sale."

In the sale notification issued on the 6th of August 1901, which was apparently the one affixed in the Collector's office, the entry in column 5 (the specification column) is as follows :—

"The *ijmali* share cannot be particularised owing to separate accounts having been opened. The share to be sold are those (*sic*) given in a separate sheet after excluding the share in respect of which the separate accounts have been opened."

The learned Judges of the High Court have given in their judgment a translation of the vernacular words in the notice. It is not necessary to consider whether their rendering is quite correct. For the fact remains that admittedly there was no specification of the share to be sold beyond what has already been stated. The intending purchaser was left to gather for himself by going through an elaborate process of elimination the property that was advertised for sale, and for which he was expected to bid. It is to be observed that the publication of the notice in *The Calcutta Gazette* is prescribed with the object of inviting purchasers from other quarters and thus not confining the bidding to speculative money-lenders and mukhtears of the neighbourhood, which is hardly likely where the notification gives little or no particulars, as in this instance, in respect of the property advertised for sale.

The cases to which their Lordships' attention has been invited give, in their opinion, no assistance in

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the determination of the point at issue here. As already observed, each case must depend on its own particular facts; what has to be considered is whether, having regard to all the circumstances, the specification was sufficiently definite and clear to induce likely buyers to appear and bid at the sale. It is not enough that they may go and obtain the requisite information from the Collector's office. In their Lordships' opinion the particulars in the notice should be sufficient in themselves to tell purchasers what they are invited to bid for.

Their Lordships, therefore, have no hesitation in agreeing with the Trial Judge that the notification in this case was insufficient and irregular, and not in compliance with the requirements of the law.

Section 33 provides that no sale should be set aside on the ground that it was made contrary to the provisions of the Act, unless the plaintiff proves that he has sustained "substantial injury" by reason of the irregularity complained of. The Trial Judge found that the property was worth a lakh of rupees, and that in consequence of the irregularity in the sale notification the defendant was enabled to buy it for one-third of its value.

The learned Judges of the High Court, after an elaborate calculation, thought that, considering the mortgages on the property, it had fetched at the sale a fair value. In view of this divergence of opinion their Lordships have examined the evidence for themselves, and they have come to the conclusion that the view of the Trial Judge, both as regards the value and the fact that the lowness of the price was due to the defectiveness of the notice, was well-founded. With respect to the value, the weight of evidence is clearly on the side of the plaintiffs; whilst a reference to the bid-sheet and the testimony of

Balmukund and Korban Ali leave little room for doubt that the low figure at which the property was knocked down was directly due to the paucity of genuine or substantial bidders in consequence of the absence of proper specification in the sale-notification.

Their Lordships cannot help regretting that the Commissioner did not annul the sale on the appeal preferred to him, which would have saved a long and harassing litigation extending over 12 years.

Their Lordships are of opinion that the judgment and decree of the High Court ought to be set aside and the decree of the Subordinate Judge restored, save and except as to villages Matasi and Mirzaganj, in regard to which the claim is permitted to be withdrawn, with liberty to the appellants to institute a fresh suit in respect thereof, if so advised. The respondents must pay the costs of this appeal and of the appeal in the High Court. And their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the first respondent: *Watkins & Hunter.*

J. V. W.

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Jan. 19.

AHMED MUSAJI SALEJI

v.

HASHIM EBRAHIM SALEJI.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Appeal—Suit to wind up partnership and for accounts—Preliminary decree referring suit to Assistant Referee—Question of disputed membership of Firm—Report of Referee confirmed by final decree of Trial Judge—Omission to appeal from preliminary decree—Appeal from final decree raising question whether inquiry was rightly referred to Referee—Civil Procédure Code (Act V of 1908), s. 97—Interest, liability for, of partner of firm after dissolution using assets of firm for business for his own benefit.

In a suit to wind up a partnership and to have accounts taken, the membership of the firm was in dispute, certain persons being by the plaintiff alleged to be partners, and by the defendants to have been only employees remunerated by a share of the profits. An adjudication was made by the Trial Judge which declared that the partnership was dissolved as from 1st July 1907, and then "ordered and decreed" that "it is referred to the Assistant Referee of this Court to take the following account and make the following inquiries, that is to say, (*a*) to inquire who were the partners entitled to share in the assets and goodwill of the partnership business, (*b*) to take an account of the dealings of the parties with the assets of the partnership business." From that adjudication, though it was appealable, the appellants did not appeal. The Referee made the enquiries directed and took the account. His report as to enquiry (*a*) was adverse to the appellants, was excepted to by them, and was confirmed by the Trial Judge in his final decree. On an appeal by the appellants raising the question whether inquiry (*a*) was rightly included in the first adjudication, or whether it was not one which should have been made by the Court itself:—

Held (affirming the decision of the Courts below), that the first adjudication of the Trial Judge which included inquiry (*a*) was a preliminary decree under section 97 of the Civil Procedure Code, 1908, and that the

* *Present*: LORD DUNEDIN, LORD SUMNER, SIR JOHN EDGE AND MR. AMEER ALI

appellants not having preferred an appeal from it could not question it on appeal from the final decree.

Where, on the dissolution of a partnership, one of the partners retains assets of the firm in his hands without any settlement of account, and applies them in continuing the business for his own benefit, he may be ordered to account for such assets with interest thereon, apart from fraud or misconduct in the nature of fraud.

APPEAL 87 of 1914 from a judgment and decree (1st September 1913) of the High Court at Calcutta in its Appellate jurisdiction which affirmed with slight variation the judgment and decree (22nd April 1912) of the same Court in the exercise of its original Civil jurisdiction.

Three of the defendants, viz., Ahmed Musaji Saleji, Ismail Ahmed Mahamedi, and Mahamed Musaji Saleji, were the appellants to His Majesty in Council.

The suit in which the above decrees were passed was brought by Hashim Ebrahim Saleji, the first respondent, as one of the executors of the will of Ebrahim Soleman Saleji, who died in September 1907, for the purpose of having a partnerstbip between the deceased testator, and the present appellants and respondents wound up by the Court; which partnership had been established to carry on the business of merchants and commission agents in Calcutta, and other places in the East, under the name of Ebrahim Soleman and Company. The terms of the partnership were, except as subsequently modified, defined by a deed dated 29th December 1902, the parties to which were (i) Ebrahim Soleman Saleji, (ii) Musaji Ahmed Saleji who died in April 1908, represented in this appeal by his son and executor Ahmed Musaji Saleji, the first appellant, (iii) Mamooji Musaji one of the respondents, (iv) Ismail Ahmed Mahamedi the second appellant, and (v) the said Ahmed Musaji Saleji. The duration of the partnership was to be for

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five years from 1st January 1903, but it was in fact admittedly dissolved on 1st July 1907. From the beginning of 1903, however, the terms of the partnership were varied by the addition of three other persons whom the respondents alleged to be partners, while the appellants stated them to be only assistants remunerated by a share of the profits: these were the respondents Yus-uf Musaji Saleji, and the appellant Mahamed Musaji Saleji (two other sons of Musaji Ahmed Saleji), and the respondent Ismail Ebrahim Saleji (another son of Ebrahim Soleman Saleji).

After the dissolution of the partnership on 1st July 1907, Musaji Ahmed Saleji together with the appellants started a new firm doing the same business under the name of Musaji Ahmed and Company, and since the death of Musaji Ahmed Saleji, that firm had been continued by the appellants.

Shortly after the death of Musaji Ahmed Saleji, the respondents, Hashim Ebrahim Saleji and Mamooji Saleji, as executors of Ebrahim Soleman Saleji and the latter also as one of the members of the partnership, called upon the appellant Ahmed Musaji Saleji as the surviving partner in Calcutta in charge of the partnership assets and of the winding up, to render to them an account of the dealings and transactions of the partnership and to pay what might thereon be found due. The appellant Ahmed Musaji Saleji failed to comply with their demand and it appeared that instead of winding up the affairs of the partnership and paying the various partners their respective shares, the appellants Ahmed Musaji Saleji and Ismail Ahmed Mahamedi were utilising the cash and assets of the partnership in the business of their new firm of Musaji Ahmed and Company without the same being debited to them or their father Musaji Saleji in the partnership books. In order therefore to preserve

the assets of the partnership, and prevent loss to the estate of Ebrahim Soleman Saleji, the respondent on 30th June 1908 instituted the suit out of which the present appeal arose.

The plaint prayed (*inter alia*) for an account of the partnership business from the date of the last settled account (which the plaintiff alleged was the 31st December 1905) to the date of the dissolution, including an account of what was due to the estate of Ebrahim Soleman Saleji, and for a Receiver of the partnership assets and books.

An interim Receiver was appointed to whom the first appellant made over the sum of Rs. 4,111 odd as all the assets of the partnership in his possession.

The defendants to the suit were the three appellants, Mamooji Musaji, Ismail Ebrahim Saleji, Yusuf Musaji Saleji, and the heirs of Musaji Ahmed Saleji, for whom subsequently the executors of Musaji Ahmed Saleji were substituted.

The defences of the appellant defendants were that the five partners named in the deed of 29th December 1902 were the only members of the partnership, the others being merely assistants remunerated by certain shares of the profits; and that the shares of the partners were modified only as regarded the division of profits, their shares in the capital as assets of the firm remaining as fixed by the deed of partnership.

The suit was heard by FLETCHER J. who passed, on 30th August 1909, a preliminary decree declaring that the partnership was dissolved in 1st July 1907, and referring to the Assistant Referee of the Court (*a*) to inquire who were the partners entitled to share in the assets and goodwill of the partnership business; and (*b*) to take an account of the dealing of the parties with the partnership business without disturbing any settled account. The decree further declared

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that if the respondents Ismail Ebrahim Saleji, and Yusuf Musaji Saleji, and the appellant Mahomed Musaji Saleji should be found not entitled to share in the assets and goodwill of the partnership, they were nevertheless entitled to share in the profits of the business up to the date of the dissolution of the partnership.

The appellants did not appeal from the preliminary decree.

In due course, on 3rd July 1911, the Assistant Referee made his report in which he found (*inter alia*) that the three persons whom the appellants alleged to be "assistants" were partners in the firm of Ebrahim Soleman and Company and entitled to share in the assets and goodwill of the business; that assets of the partnership to the extent of more than Rs. seven lakhs had been appropriated by the appellants and Musaji Ahmed Saleji; and used in their new firm of Musaji Ahmed and Company, of which about half was not entered in the books of the partnership, and no record was kept by the appellants.

The appellants filed a number of exceptions to this report which were all heard by FLETCHER J., and discharged with costs, and the report was confirmed by a decree dated the 22nd April 1912 which ordered the appellants to bring into Court certain sums aggregating Rs. 7,24,373 odd (representing the assets of the partnership found to be in their hands respectively, or for which they were accountable) with interest thereon at the rate of 6 per cent. per annum from 1st July 1907, the date of the dissolution.

From that decree the appellants appealed on the grounds so far as material to this report (*a*) that it ought not to have been referred to the Assistant Referee to ascertain who were the members of the partnership, but that this question ought to have been

determined by FLETCHER J.; and (*b*) that the appellants were not liable for interest on the amount they were ordered to bring into Court.

As to the first ground the Appellate Court (SIR LAWRENCE JENKINS C. J. and WOODROFFE J.) held that no appeal having been preferred from the preliminary decree, no objection could then be taken to the form of that decree. The Appellate Court said :—

"The first ground urged on appeal is that it was erroneous to refer to the Assistant Referee the enquiry as to who were the partners entitled to share in the assets and goodwill of the partnership business, and it is maintained that the enquiry ought to have been held in Court and determined by the Judge.

"I think it was a mistake to have delegated to the Assistant Referee the decision of the complicated question involved in the first enquiry. There is no rule or established course of procedure in this Court which could justify the reference to this officer of an enquiry in these terms, nor has there been any delegation of duties to the Assistant Referee under section 128 of the Code. I am therefore of opinion that the question involved should have been determined by the learned Judge himself before the preliminary decree.

"This view is supported by the express provisions of the Code. Thus in Order XX, rule 15, it is provided that where a suit is for dissolution of partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree, declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved, or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

"In Appendix D a form (No. 21) is given for preliminary decree in such a suit and it starts with a declaration that the proportionate shares of the parties in the partnership are as follows :—Order XLVIII, rule 3, prescribes that the forms given in the appendices with such variation as the circumstances of each case may require, shall be used for the purposes herein mentioned.

"But while I think the reference should not have been directed, section 97 of the Code is a bar to the present appeal from the decree in which the direction was contained. It was a preliminary decree (section 2, explanation), and the present appellants' claim to be parties aggrieved by it; but they preferred no appeal from it within the prescribed period. Therefore they are now precluded from disputing its correctness on this

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appeal. This is just the class of case against which section 97 is directed: no objection was taken to the competence of the direction when it was given, the appellants joined in the reference without any protest, and now that the result of the reference has proved adverse to their contention they seek to attack the decree directing that reference. This case obviously comes within the provisions of section 97."

The Appellate Court on the question as to who were the partners and what were their shares in the assets, agreed generally with the conclusions come to by the Referee in his report, and by FLETCHER J., and held that the three persons subsequently added to the firm were full partners.

On ground (*b*) the Court of Appeal held that FLETCHER J. had a discretion to allow interest, and that having regard to the conduct of the appellants, and the circumstances under which the liability arose, that discretion ought not to be interfered with.

By reason of an error in one of the items of the account, and of there being two other items which were doubtful, the Appellate Court found that the total sum due by the appellants collectively was (apart from interest) Rs. 7,12,762 odd. Except for this and a slight variations in the order for costs made by FLETCHER J. the findings of the Referee and FLETCHER J. were confirmed.

On this appeal,

Sir R. Finlay, K. C., A. M. Dunne and *B. N. Bose*, for the appellants, contended that the question who were the members of the partnership entitled to share in the assets and goodwill of the firm was one which should properly have been determined by the Court, and was therefore wrongly referred for inquiry to the Assistant Referee by the Trial Judge. The appellants, it was submitted, were not prevented by the fact of their not having appealed from the preliminary decree, from now raising the point whether under section 97

of the Civil Procedure Code, 1908, that reference was properly made, on appeal from the final decree: and the case of *Khadem Hossain* v. *Emdad Hossain* (1) was referred to. [MR. AMEER ALI. The decision in that case was the cause of an alteration in the Code of 1908]. But the present case was not affected by section 97, being not a case of a decision of the rights of the parties, but a case where the Court had referred a matter to the Referee which he had no jurisdiction to refer, and which ought to have been decided by the Court itself. It was a delegation by the Court of its powers which it could not rightly make. The order of reference was either an order or a decree: and it was contended it was not a decree within the definition of that word in section 2 of the Code, and the appellants were, it was submitted, entitled to raise the question of its correctness. [LORD DUNEDIN. Their Lordships are of opinion that the appellants ought to have appealed from the preliminary decree, and are precluded from appealing now. Reasons for the decision will be given later.]

It was then contended for the appellants that the amount which they had been ordered to pay into Court was excessive, and that interest upon it should not have been decreed. Interest in such a case should not be allowed unless, there was fraud, and of that there was no finding. [SIR JOHN EDGE, as to the conduct of the appellants, referred to a passage in the judgment appealed from where the High Court said: "Though a Receiver was appointed long prior to the preliminary decree, the three appellants did not hand over these assets to him, nor can we find that they even brought them to his notice. On the contrary they have resisted to the utmost all attempts to prove their

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possession of these assets, and persisted in this resistance."] Reference was made to 3 and 4, Will. IV, c. 42, section 28, which was adopted in the Indian Interest Act (XXXII of 1839); Bullen and Leake (2nd Ed.) 51, 52; *London, Chatham and Dover Railway Company* v. *South-Eastern Railway Company* (1), *Johnson* v. *The King* (2) and *Burland* v. *Earle* (3).

Upjohn, K. C., W. H. Cozens-Hardy and *G. R. Lowndes*, for the respondents, contended that no question as to the amount ordered to be paid into Court was raised in the Court below, and therefore it should not be entertained on this appeal. The right of the respondents to interest on the amount depended on the law of the Equity Courts that whereafter a partnership has been dissolved, a partner continuing the business takes assets of the late partnership and trades with them, the other partners have a right to elect whether they will take a share of any profits made, or have interest on the amount taken. Reference was made to Lindley on Partnership, Book IV, Ch. 2, Section 2 (6th Ed.) 592; (7th Ed.) 632; (8th Ed.) 673; *Clements* v. *Hall* (4), *Yates* v. *Finn* (5) and *Burland* v. *Earle* (3). The discretion of the Court is properly exercised if it decrees interest in such a case as this, and both Courts below had agreed in so exercising this discretion.

Sir R. Finlay, K. C., was called on to reply.

Jan. 19.

The judgment of their Lordships was delivered by

LORD SUMNER. This was an action to have partnership accounts taken, and for that purpose to have various matters decided by the Court. Three questions

(1) [1893] A. C. 429, 437.
(2) [1904] A. C. 817, 821, 822.
(3) [1905] A. C. 590, 592.
(4) (1858) 2 De Gex. & J. 173, 186.
(5) (1880) L. R. 13 Ch. D. 839, 843, 844.

only were raised before their Lordships on the present appeal.

The circumstances raising the first question were as follows. The membership of the firm was in dispute. Certain persons were alleged, on one side, to have been partners, and, on the other, to have been only employees remunerated by a share of annual profits. The suit was begun on 30th June 1908, and on 30th August 1909 the Trial Judge, Fletcher J., by his formal adjudication (to use a neutral term) "declared" that the partnership in question was dissolved as from 1st July 1907, and then "ordered and decreed" that—

"It is referred to the Assistant Referee of this Court to take the following account and to make the following enquiries, that is to say :—

"(*i*) To enquire who were the partners who were entitled to share in the assets and goodwill of the said partnership business ;

"(*ii*) To take an account of the dealings of the parties with the assets of the said partnership business ;"

and, further, certain other matters not now material.

This adjudication was immediately appealable but was not appealed. The Assistant Referee duly held the enquiries directed, and all matters were gone into at a great expenditure of time and money. His report on enquiry No. 1 was adverse to the appellants, and being excepted to by them was confirmed by Fletcher, J.

The appellants then, by memorandum of appeal dated 23rd May 1912, raised the question whether enquiry No. 1 was rightly included in the adjudication dated 30th August 1909, or whether it was not one which should have been made by the learned Judge himself. This at once and for the first time raised the question, which is the first and chief issue in the present appeal, whether the above-mentioned determination of Fletcher J. was a "decree" or an "order" within the meaning of those terms in the Civil Procedure Code, Act V of 1908. If it was a decree it was a preliminary decree within section 97, and any appeal

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was incompetent and barred thereby; if it was an order it was appealable still. Their Lordships would unfeignedly deplore a state of procedure which enabled the appellants to take their chance of success before the Assistant Referee at such a cost in time and money and then, after they had lost the day, to contend that the matter never should have gone before him at all; yet it must be so if such be the meaning of the Code.

The High Court, while thinking that the enquiry in dispute should not have been directed, decided at the same time that the adjudication of Fletcher J. which included this direction, was itself a decree and therefore being a preliminary decree could not under section 97 of the Code be questioned on the final appeal. Their Lordships are in accord with the learned Judges of the High Court.

The adjudication itself began by declaring that the partnership was dissolved as from a certain date, and thus *in limine* settled rights between the parties. This declaration was the foundation for all subsequent accounts and proceedings, which were merely incidental thereto and consequential thereon. It matters not whether the instrument of partnership fixed the dissolution at a date which had passed before the suit began, or whether the parties had agreed to a dissolution or agreed in submitting to a dissolution by the Court, or whether the Court decreed a dissolution for cause shown before it after a *litis contestatio*. The declaration when so made was what the Court's adjudication, and indeed the appellants' own case, call it, a decree. The Code makes no provision for something which is neither a decree nor an order, nor for anything which is both, neither does it provide that one adjudication by the Court can be resolved into divers elements, some of which are decrees and some orders.

This was in substance a decree: it did not cease to be such, because a subordinate part of it, if correctly made, might have been separately as an order. It conclusively determined the rights of the parties in regard to certain, and those essential, matters, involved in the suit, and the expression "Matters in controversy" in section 2 (*2*), the (definition of "decree") cannot, in their Lordships' opinion, be pressed so as to exclude matters which, though as it happened they were common ground, must have been actually decided, if any question had arisen and were the foundation of the whole determination. The Code, has got rid of such doubts as were debated in *Khadem Hossein* v. *Emdad Hossein* (1). Accordingly section 97 of the Code applies: the appellants took their objection too late and the High Court rightly decided against them.

The residue of the case may be shortly disposed of. The appellants were ordered to bring certain money into Court and to pay interest as from a certain date. The contention on the former point, namely that the amount was excessive, was not raised below at all and but faintly before their Lordships. In any case the amount ordered to be brought into Court was a matter of discretion and that discretion does not appear to have been exercised on any wrong principle. No more need be said as to this. The other point is equally short. It is well settled that in certain cases, when on the dissolution of a firm one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he may be ordered to account for these assets with interest thereon, and this apart from fraud or misconduct in the nature of fraud. The report of the Assistant Referee disclosed conduct of this sort on the appellants' part falling within the

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decided cases, even if it did not amount to fraud, as probably the Referee meant to find that it did. Both Courts below adopted this report and therefore there are concurrent findings of fact against the appellants and no question of law is raised at all.

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: *Burton, Yeates & Hart.*
Solicitors for the respondents: *Watkins & Hunter.*

J. V. W.

CIVIL RULE.

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Feb. 2

Before D. Chatterjee and Chapman JJ.

SIVAPRASAD RAM

v.

TRICOMDAS COVERJI BHOJA.*

Jurisdiction—Proceeding under s. 10, Civil Procedure Code—High Court's jurisdiction to interfere with interlocutory orders—Civil Procedure Code (Act V of 1908), s. 10.—Charter Act (24 & 25 Vict. c. 105), s. 15.

The jurisdiction of a Court in a proceeding under s. 10 of the Code of Civil Procedure is limited to stopping a new suit if the circumstances mentioned in that section as conditions precedent to the passing of the order be found by the Court to exist. Courts have no jurisdiction to decide the question of *res judicata* in such a proceeding.

Where a Court has jurisdiction to pass an order, but it has been exercised in violation of the provisions of the law and under a misapprehension

* Civil Rule No. 1302 of 1914, against the order of Beraja Chandra Mitra, Subordinate Judge of Burdwan, dated Dec. 17, 1914.

of the questions at issue, the Court must be held to have acted with material irregularity in the exercise of its jurisdiction.

Venkubai v. *Lakshman Venkoba Khot* (1), *Sew Bux Bogla* v. *Shib Chunder Sen* (2). *Jugobundhu Pattuck* v. *Jadu Ghose* (3), *Tarini Charan Banerjee* v. *Chandra Kumar Dey* (4) referred to.

The High Court is entitled to interfere under s. 15 of the Charter Act, if not under s. 115 of the Code, with interlocutory orders, when they might lead to failure of justice or irreparable injury.

Dhapi v. *Ram Pershad* (5), *Gobinda Mohan Das* v. *Kunja Behary Dass* (6), and *Amjad Ali* v. *Ali Hussain Johar* (7) referred to.

RULE obtained by Sivaprasad Ram and others, the plaintiffs.

This Rule arose out of an application by the opposite party for stay of proceedings under s. 10 of the Code of Civil Procedure in Suit No. 18 of 1913 in the Court of the Subordinate Judge of Burdwan which was filed by the petitioners against the opposite party and another. The Subordinate Judge granted the application and ordered proceedings in the suit to be stayed pending the decision of an appeal in the High Court. Thereupon the plaintiffs applied to the High Court for setting aside the order staying proceedings. The other material facts appear from the judgment in this Rule.

Defendant No. 2 did not appear in the Rule.

Babu Bipin Behari Ghose (with him *Babu Mohinee Nath Bose*), for the petitioners. The parties are not the same. The plaintiff in the previous suit is no party in the present suit and there is a new defendant here. The claim in the previous suit was for extra-royalty and was based on contract. The present suit is based on tort. It cannot be said that

(1) (1887) I. L. R. 12 Bom. 617.
(2) (1886) I. L. R. 13 Calc. 235.
(3) (1887) I. L. R. 15 Calc. 47.
(4) (1910) 14 C. W. N. 788.
(5) (1887) I. L. R. 14 Calc. 768.
(6) (1909) 14 C. W. N. 147.
(7) (1910) 15 C W. N. 353.

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the matter is *res judicata*. No party says that it is so. The reliefs claimed in the two suits are also different. In the previous suit we were only *pro-formâ* defendants and we could not have claimed any relief. It is very hard on us that proceedings in our suit should be stayed while the suit brought by the opposite party against us would go on. The appeal pending in this Court may not be decided for some time. Moreover, a suit cannot be indefinitely postponed. *Amir Hassan's Case* (1) cannot apply. It is not a case of mere error of law. There is a distinction between a mere error of law and an error of procedure in misapplying a section to a case where obviously it has no application. *Amir Hassan's Case* (1) was discussed in *Sew Bux Bogla* v. *Shib Chunder Sen* (2). See also *Debo Das* v. *Mohunt Ram Charn Dass Chella* (3). There are several other well-known cases in which this Court has interfered in its revisional jurisdiction. Even if we cannot come under section 115 of the Code, I can ask your Lordships to interfere under section 15 of the Charter Act, as grave injury will result if the order is not set aside. In cases of grave injury this Court has interfered in an interlocutory order.

Dr. Rashbehary Ghose (with him *Dr. Dwarkanath Mitra* and *Babu Tarakeshwar Pal Chaudhuri*) for the opposite party. It is not right to contend that s. 10 of the Code does not apply to the facts of this case. S. 10 of the Code of 1908 is wider than the corresponding section of the Code of 1882. The provisions of the section in the new Code apply, though the relief claimed in the second suit may not be the same as that claimed in the first suit. S. 12 of the old Code contained the words "for the same relief"

(1) (1884) I. L. R. 11 Calc. 6. (2) (1886) I. L. R. 13 Calc. 225, 230.
(3) (1898) 2 C. W. N. 474, 477.

after the words "previously instituted suit." Hence it was absolutely necessary to the application of the section not only that the matter in issue in the second suit should be also directly and substantially in issue in the first suit, but that the second suit must be *for the same relief* as that claimed in the first. Those words have been omitted in the present section. The effect of this omission has been to render the provisions of the section in the new Code applicable, even though the relief claimed in the subsequent suit may not be the same as that claimed in the first suit. What is now essential is really the identity of the matter directly and substantially in issue. The identity of the relief claimed is immaterial. See Mulla's notes on the section. Reads the plaint and the issues in the former suit. Even if s. 10 does not apply, the Subordinate Judge has at most committed an error of law. This Court cannot interfere under section 115 with an error of law: see *Amir Hassan's Case* (1). This is again an interlocutory order, and this Court cannot interfere for "no case has yet been decided" within the meaning of the section.

Cur. adv. vult.

D. CHATTERJEE J. The petitioners and the opposite party hold two contiguous collieries under the Maharaja of Pachete. The Maharaja brought a suit No. 391 of 1910 in the Court of the Subordinate Judge of Burdwan against the opposite party for the recovery of extra royalty for coal said to have been appropriated by him by encroaching on the lands of the colliery of the petitioners, who were made *pro formâ* defendants. The claim was based on the terms of the contract entered into by the opposite party with the Maharaja. In that suit the opposite party pleaded

(1) (1884) I. L. R. 11 Calc. 6.

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CHATTERJEE J.

that the encroachment, if any, was made not by him but by his vendor who was not a party to the said suit. One of the issues in that suit was whether the opposite party had made any encroachment on the lands of the petitioners and the Court found that they had. Pending the decision of that suit the petitioners brought the present suit in the same Court against the opposite party as defendant No. 1 and his vendor as defendant No. 2 for damages for the encroachment found in the previous suit as well as further encroachment and loss caused by flooding the petitioners' mine and other reliefs. The opposite party also filed a suit against the petitioners making counter-charges of encroachment. These two fresh counter-suits were ordered to be tried together. The opposite party then made an application under section 10 of the Civil Procedure Code for stopping the suit of the petitioners and the learned Subordinate Judge has passed an order which has the effect of stopping the trial of the petitioners' suit for an indefinite time whilst the opposite party is at liberty to proceed with his suit against the petitioners. The petitioners obtained this Rule on the ground that the order was incompetent, illegal and irregular. I think that the order made by the learned Subordinate Judge ought not to stand. Section 10 of Civil Procedure Code requires among other things that the suits should be between parties litigating under the same title. The Maharaja was suing in the previous suit as landlord for royalty under contract and the present suit is by one tenant of the Maharaja against another and based on tort. Then again the issue can hardly be said to be the same, as the encroachment charged in this suit covers a larger area than that found in the prior suit. This is quite sufficient to take the case out of the purview of section 10, but the learned Subordinate

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Judge says he is clearly of opinion that the decision in the previous suit would operate as *res judicata* between the two defendants in that case and would therefore bar this suit. I do not think it proper to express any opinion on this point at this stage of the case and the learned Subordinate Judge was not called upon to express the opinion that he has expressed in this connection in a proceeding under section 10.

It is contended by the learned vakil for the opposite party that we cannot interfere with the order of the Court below as it does not violate any rule of jurisdiction. Reliance is placed on the decision of the Privy Council in the case of *Amir Hassan Khan* v. *Sheo Baksh Sing* (1). It is also contended that the case has not been decided and we have no jurisdiction to interfere with an interlocutory order.

As regards the question of jurisdiction, I feel no difficulty. The learned Subordinate Judge had no jurisdiction to decide the question of *res judicata* in a proceeding under section 10. His only jurisdiction in this proceeding was to stop the new suit if he found the existence of the circumstances mentioned in the section as conditions precedent to the passing of the order. He has come to no finding as to whether the parties were litigating under the same title. If he had come to a finding right or wrong that would have been another matter; but he has come to none and I think he had no jurisdiction to pass the order; but supposing he had the jurisdiction, he has exercised it in violation of the provisions of the law and under a misapprehension of the questions at issue, and has therefore acted with material irregularity in the exercise of his jurisdiction: see *Venkubai* v. *Lakshman*(2), *Sew Bux Bogla* v. *Shib Chunder Sen*(3),

(1) (1884) I. L. R. 11 Calc. 6. (2) (1887) I. L. R. 12 Bom. 617.
(3) (1886) I. L. R. 13 Calc. 225.

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CHATTERJEE J.

Jugobundhu Pattuck v. *Jadu Ghose* (1), *Tarini Charan Banerjee* v. *Chandra Kumar Dey* (2).

As regards the second objection there is ample authority in this Court for our interference with interlocutory orders when they might lead to failure of justice or irreparable injury: see *Dhapi* v. *Ram Pershad* (3), *Gobinda Mohon Das* v. *Kunja Behary Dass* (4), *Amiad Ali* v. *Ali Hussain Johar* (5). Even if it were doubtful whether section 115 does empower us to interfere in a case of this kind, I think that our powers under section 15 of the Charter Act are wide enough to enable us to do justice. In this case the opposite party may go on encroaching on the petitioner's land, he may flood the petitioner's mine or even let down the surface and make investigation impossible, and yet the petitioner would not have a word to say until the previous suit is finally decided years later, when investigation may be impossible, when evidence may have disappeared and when a decree may be nugatory: and while the petitioners are thus handicapped by the order of the Court, the opposite party may run his own suit against the petitioners unhampered by either the suit of the Maharaja or the suit of the petitioners. I cannot conceive of a greater injustice and I have no hesitation in setting aside the order of the learned Subordinate Judge and making the rule absolute with costs.

CHAPMAN J. I agree.

S. M. *Rule absolute.*

(1) (1887) I. L. R. 15 Calc. 47.
(2) (1910) 14 C. W. N. 788.
(3) (1887) I. L. R. 14 Calc. 768.
(4) (1909) 14 C. W. N. 147.
(5) (1910) 15 C. W. N. 353.

APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C.J., and Woodroffe J.

RAM CHARAN LAW

v.

FATIMA BEGAM.*

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Feb. 3.

Mahomedan law—Wakf—Constitution of wakf by deed of trust—Objects charitable and religious—Validity of wakf.

Where with the object of dedicating a house to the service of the Imams, Hassan and Hussain, and for other religious purposes, the settlor had conveyed the house to his grand-daughter and his grand-son on trust for the proper observance of the objects mentioned in the deed :—

Held, that there was a valid wakf.

Delroos Banoo Begum v. *Ashgur Ally Khan* (1) discussed.

Phul Chand v. *Akbar Yar Khan* (2), *Biba Jan* v. *Kalb Husain* (3), *Mazhar Husain Khan* v. *Abdul Hadi Khan* (4) referred to.

APPEAL by the plaintiff, Ram Charan Law, from the judgment of Imam J.

This appeal arose out of an action brought by the plaintiff, which raised the question of the validity or otherwise of a deed dated the 15th July 1864 purporting to be a deed of wakf. The material facts are fully set out in the judgment of Imam J. which was as follows :—

IMAM J. In this suit the plaintiff seeks declaration of his title to, and possession over a half share in premises No. 63, Dhurrumtolla Street, in the town of Calcutta and a consequent partition of the said premises. The facts material to this case are shortly these : One Prince Syeduddin, a Mahomedan of the Sunni sect, owned and possessed several valuable properties in Calcutta, one amongst them being the premises of which a half share is in suit. He conveyed the said premises to his grand-daughter Sahebzadi Fatima Begam and his grand-son Fiazuddin under a deed of waqf dated

* Appeal from Original Civil, No. 56 of 1914, in suit No. 422 of 1911.

(1) (1875) 15 B. L. R. 167.
(2) (1896) I. L. R. 19 All. 211.
(3) (1908) I. L. R. 31 All. 136.
(4) (1911) I. L. R. 33 All. 400.

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the 15th day of July 1864, the purpose of the dedication being stated in the deed to be "service of Imam Hussain and Hassan and for religious purposes" in the manner mentioned in the deed. The direction to Fatima Begam and Fiazuddin and to their successors in the trust under the endowment is to apply the rents and profits of the premises after defraying the cost of collection and repairs "to the due and proper observance of the annual Mahomedan festival of the Mohorrum."

On the 20th September 1907, Fatima Begam mortgaged a half share of the premises to the plaintiff for the consideration of Rs. 16,000 advanced to her by the latter. The debt not having been repaid the plaintiff sued Fatima Begam on the mortgage and obtaining a mortgage decree purchased the half share of the premises at the execution sale. Before the sale Nurul Huq, a son of Fatima Begam, addressed a letter through his attorney to the Registrar of this Court requesting him to notify to the intending purchasers at the sale Nurul Huq's protest that the property was a waqf and that Fatima Begam had not a saleable interest. The plaintiff having failed to secure possession of the half share purchased by him has instituted this suit against Fatima Begam, Nurul Huq her son and the other defendants who are the descendants of Fiazuddin. The suit, however, has been contested by the defendants other than Fatima Begam and Nurul Huq. The plaintiff's contention is that the deed of the 15th August 1864 though on its face purporting to dedicate the property as waqf to religious uses was in effect a deed of gift, the donor having adopted the device of a waqf in order to preserve the property for the benefit of the donees. The contesting defendants assert the validity of the alleged waqf and deny the plaintiff's title to a moiety of the premises. There is only one issue that is material to the decision of this case, namely, whether the deed of the 15th July 1864 is valid and operative as a deed of waqf. For the plaintiff two objections are taken to the deed (i) that the object of the waqf is not valid under the Mahomedan Law, (ii) that the conveyance was in reality a gift; dedicating the property "in the way of God" not being the intention of the donor. It is contended for the plaintiff that in the deed there is no indication that a general benefit was intended to be conferred on the Mahomedan public and a reference has been made to the case of *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally Khan* (1) in support of the proposition that the observance of the Mohorrum by a Mahomedan is a matter essentially of a private character. I cannot accede to the proposition in the general way it has been put. If the observance of the Mohurrum entails the feeding of the poor and distribution of alms to the needy, as it undoubtedly does, the dedication of the property to such use constituted the service of man and the good of humanity, though to a limited

(1) (1875) 15 B. L. R. 167.

section. Apart from the help to the poor and the needy, the commemoration of the historic events of Karbala keeping alive as it does some of the best tradition of Islam is to my mind as good a purpose as the followers of a faith can have. I see in it the visualisation of the grandest examples of courage and endurance and all that is heroic in man from the pages of Islamic history and I think it would be wrong to exclude it from objects valid for waqf. In the case of *Delroos Banoo Begum* v. *Nawab Ashgur Ally Khan* (1), the decision rested on considerations that do not affect the present case. The Imambara in that case was a part of the private dwelling house of the Begam ; in the present instance there is not the maintenance of the Imambara attached to a private house that is the purpose of the waqf, but it is the keeping up of the Mohurrum as an institution with all its moral effect on the general Mahomedan public. The contention that Prince Syeduddin adopted the device of a waqf and in effect made a gift is not borne out by any of the circumstances of the case. The value of the premises, half of which is in suit, was admitted to be Rs. 14,300 only in 1864. The Prince about that time made certain dispositions of his other properties of the value of more than Rs. 58,000 in favour of Fatima Begam and Fiazuddin and the deeds relating to these properties do not show that he adopted any device to preserve them for his grand children for all times. Had it been his intention to tie up the properties for their benefit by a device, we should have had a waqf of all the properties and not merely of the premises in suit. I hold that the deed of the 15th July 1864 is valid and operative as a deed of waqf. In this view, Fatima Begam had not a saleable interest in the property and the plaintiff by his purchase obtained no title to it. The suit is, therefore, dismissed with costs on scale No. 2, including reserved costs, if any.

The plaintiff appealed.

Mr. B. Chakarvarti (with him *Mr. B. K. Lahiri* and *Mr. N. Ghattak*), for the appellant, contended that although the deed of the 15th July 1864 purported to dedicate the property as wakf to religious uses, it was in effect a deed of gift. The device of a wakf had been adopted in order to preserve the property for the benefit of the donees and was invalid. Moreover, the disposition did not constitute a wakf: see *Delroos Banoo Begum* v. *Ashgur Ally Khan*(1).

Mr. A. Rasul (with him *Mr. Z. Ali* and *Mr. Ashraf*

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Ali), for the respondents. The case of *Delroos Banoo Begum* v. *Ashgur Ally Khan*(1) has no application. There is no objection to the creation of a wakf by a deed of trust : see *Bishen Chand Basawat* v. *Nadir Hossein* (2). He also referred to, among others, the cases of *Phul Chand* v. *Akbar Yar Khan* (3), *Biba Jan* v. *Kalb Husain*(4), and *Mazhar Husain Khan* v. *Abdul Hadi Khan* (5).

Cur. adv. vult.

JENKINS C.J. The question involved in this appeal is whether a Mahomedan lady, Shahebzadi Fatima Begam, had a saleable interest in a moiety of premises known as No. 63, Dhurrumtollah Street which the plaintiff claims to have bought in execution of a mortgage decree in Suit No. 527 of 1908.

The suit has been dismissed by Imam J., and from his judgment the plaintiff has appealed.

The decision of this suit depends upon whether or not this property has been validly dedicated as wakf or not. If it has, then the suit must fail.

The dedication is said to have been effected by a document of the 16th July 1864. It is in the form of an English Indenture and is expressed to be a conveyance to Fatima Begam and Fyezuddin, their heirs representatives and assigns, of the entirety of the premises now in suit, upon trust that they the said Fatima Begam and Fyezuddin their heirs or representatives or other trustees or trustee for the time being should from time to time demise the said hereditaments and premises to such persons or person on such terms and at such rent as they should think fit, and should from time to time appoint such person or persons to act as sircars

(1) (1875) 15 B. L. R. 167.
(2) (1887) I .L. R. 15 Calc. 329.
(3) (1896) I. L R. 19 All. 211.
(4) (1908) I. L. R. 31 All. 136.
(5) (1911) I. L. R. 33 All. 406.

or a sircar in the collection of the said rents as they should think fit with full power to discharge such sircars or sircar and to appoint others or another in his place and should apply the rents and profits of the said hereditaments and premises first in payment of the expenses of the collections of the said rents and profits and of the management of the salary of the said sircars or sircar and otherwise and of the execution of the trust and next in payment of the expenses of the repairs of the said hereditaments and premises and should apply the surplus of the said rents and profits after making the payments aforesaid in the due and proper observance of the annual Mahomedan festivals of the Mohorrum.

Fatima Begam is the defendant of that name. Fyezuddin is dead, and the other defendants are his representatives.

On the 20th of September 1907, Fatima Begam executed a document by which there was expressed to be mortgaged to the plaintiff the half share now in suit, it being recited that she was absolutely seized and possessed of or otherwise well entitled to that half share.

It was on the basis of this mortgage that the decree was passed, in execution of which the plaintiff claims to have purchased this half share.

Fatima Begam has appeared in the suit and put in a written statement alleging the wakf character of the property. She has, however, taken no part in the discussion before Imam J. or this Court. The other defendants have appeared and contested the plaintiff's claim contending that the property is wakf, or that at any rate what they describe as their moiety is unaffected by the mortgage and consequent sale. It is unnecessary to discuss any technical defect there may be in the form of the suit; the substantial question is

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whether there has been a valid dedication or not, and it is on these lines that the case has been fought before us.

The plaintiff has urged many objections to the validity of the wakf.

The first point made is that the gift was to Fatima Begam and Fyezuddin on a condition, and that is inoperative because the Mahomedan law does not permit a condition to be attached to a gift. The recital to the deed, however, makes clear the executant's purpose, for it runs in these terms, "whereas the said Prince Mahommed Syeduddin is seized of or entitled to the hereditaments and premises hereinafter described for an absolute estate of inheritance and he is desirous of dedicating the same to the service of Imam Hassan and Imam Hussein and for religious purposes in the manner hereinafter mentioned."

The object of the gift is plain, and the introduction of trustees is merely the employment of machinery whereby the gift is carried into effect. The trustees are not donees, and it would be far too narrow a view to hold that the gift is vitiated by a condition. Mr. Chakravarti would go the length of contending that all gifts through the instrumentality of trusts are bad. It would be difficult to reconcile that view with the language of the High Court and the Privy Council in *Bishen Chand Basawat* v. *Nadir Hossein*(1).

In my opinion this objection fails, and I hold that the provision in favour of the due and proper observance of the annual Mahomedan festival is not invalidated by the introduction of trustees as part of the machinery for carrying it into effect.

But then it is contended that the disposition does not constitute a wakf, and Mr. Chakravarti has relied on the decision of *Delroos Banoo Begum* v. *Nawab*

(1) (1887) I. L. R. 15 Calc. 329.

Syud Ashçur Ally Khan (1) as conclusive in his favour. But this argument appears to me to rest on a misreading of the judgments of the High Court and the Privy Council in that case.

The defendant there dedicated the whole of her property in perpetuity and provided that the income derived from the endowment, after the payment of the Government revenue, should be divided into twenty-eight parts, fifteen parts whereof should be applied to the expense of the *fatiha* of Mahomed and the Imams, as well as to those of the first ten days of the Mohorrum and all the holidays, and the repairs of the Imambara and the tombs; seven parts should be received by the amlhas and servants, whose names should be inserted at the foot of the document in question or any other document bearing the defendant's seal and signature and which the said servants might have in their possession, some from generation to generation, and the others as long as they retain service; and the remaining six parts should be received by the mutawalis, *i.e.*, the defendant and her co-mutawali.

The plaintiffs as members of the Mahomedan community sued the defendant as the mutawali of the endowment for her removal from that office on the ground of misfeasance with the wakf estate. Leave to institute the suit was obtained under Act XX of 1863.

It was objected that there was no jurisdiction to grant leave, as the alleged endowment did not come within the scope of the Act, that there was no intention of creating an absolute wakf, and that the defendant was not aware of the contents and legal effect of the deed at the time of its execution. The other defences need not be noticed. In the Court of first instance the plaintiff's suit was decreed. In the High

(1) (1875) 15 B. L. R. 167.

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Court this decree was reversed and the suit was dismissed on the ground that the appropriation was not of a public character and that Act XX of 1863 did not apply to it. It followed that the Judge had no authority to give the plaintiff leave to sue and that his decition was *ultra vires*.

But while the learned Judges determined that there had been no grant of land for public purposes within the meaning of the Act read in the light of Regulation XIX of 1810, they by no means decided that the dedication did not constitute a wakf. On the contrary the Court agreed in thinking that so far as words went it was a wakf which would have bound the appropriator, but held in view of the dedicator's position as an illiterate and prejudiced woman with no professional assistance, that the dedication was not binding.

This is made abundantly clear by the concluding words of the judgment where it is said,—"As to the objections raised by the defendant that the wakf was indefinite and void, I think it enough to say that it, in my judgment, fully answered all the requirements of the Imameea Law, and that if it had been really and knowingly executed it would have bound Delroos Banoo Begum without the power of revocation.

The case was taken on appeal to the Privy Council [see *Ashgar Ali* v. *Delroos Banoo Begum* (1)] and the judgment was affirmed on ground that the dedicator was not bound by the deed, as the precautions required in the case of *pardahnashin* executants were not observed.

There is, however, no trace of any suggestion that, apart from this, a wakf was not legally constituted; rather does the judgment indicate that its validity, apart from the executant's incapacity, was questioned.

(1) (1877) I. L. R. 3 Calc. 324.

I, therefore, see nothing in this case that tells against the validity of the endowment now in question, and, if anything, it is an authority in its favour.

And in support of the view that a wakf was legally constituted, reference may be made to *Phul Chand* v. *Akbar Yar Khan* (1), *Biba Jan* v. *Kalb Husain* (2), *Mazhar Husain Khan* v. *Abdul Hadi Khan* (3).

Nor do I think that it is made out that the deed of the 15th July 1864 was a colourable transaction; indeed, the plaintiff cannot well contend that it was fictitious or had no operation, for his suit is one for partition, and it is only by virtue of this deed that any of the defendants acquired any interest in the property that would support a suit for partition. Equally futile is any argument which depends on the contention that the earlier release is open to attack.

The result then is that, in my opinion, a valid wakf was legally constituted and that the employment of trustees for the purpose of carrying it into effect in no way prejudiced the dedication.

I therefore hold that the suit was rightly dismissed, and that this appeal too must be dismissed with costs.

WOODROFFE J. I agree.

Appeal dismissed.

Attorney for the appellant: *N. C. Mandal.*

Attorneys for the respondents: *Alum & Nan; Hari Pada Dutt.*

(1) (1896) I. L. R. 19 All. 211. (2) (1908) I. L. R. 31 All. 136.
(3) (1911) I. L. R. 33 All. 400.

W. M. C.

APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C.J., and Woodroffe J.

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Feb. 4.

SUDAMDIH COAL Co., LD.

v.

EMPIRE COAL Co., LD.*

Jurisdiction—"Suit for land or other immoveable property," construction of—Letters Patent, 1865, cl. 12—Trespass—Compensation for wrong to land—Wrongful cutting and removal of coal—Civil Procedure Code (Act V of 1908), s. 16—Civil Procedure Code (Act VIII of 1859), s. 5—Venue.

The expression "suits for land or other immoveable property" in clause 12 of the Charter of 1865 cannot be construed as being limited to suits for the recovery of land in its strict sense, but must be construed as extending to a suit for compensation for wrong to land, where the substantial question is the right to the land.

APPEAL by the plaintiff company, (Sudamdih Coal Co., Ld.,) from the judgment of Fletcher J.

The plaintiff company and the defendant company who have their registered offices in Calcutta were the owners of adjoining collieries situate in Sudamdih in the district of Manbhoom in the province of Bihar and Orissa. The boundary between the plaintiffs' and the defendants' properties was demarcated superficially by pillars. It was alleged by the plaintiffs, but denied by the defendants, that the plaintiffs had left as a protection a barrier of twenty-five feet along the eastern boundary of its property.

The plaintiffs further alleged that in the month of June 1913 the defendants cut through the plaintiffs' barrier into their property thereby causing mud and water to flow into their colliery, and that the

* Appeal from Original Civil, No. 78 of 1914, in Suit No. 549 of 1914.

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defendants had worked and carried away a quantity of the plaintiffs' barrier and other coal. On the 28th and 29th June a joint survey was held and it was ascertained that the defendants had encroached on the plaintiffs' property. By reason of the defendants' wrongful acts the working of the plaintiffs' colliery had been seriously affected, and their coal had become damaged and water-marked and greatly depreciated in value. The plaintiffs claimed the sum of Rs. 2,744 as the value of their coal extracted by the defendants and the sum of Rs. 50,000 as damages.

In their written statement the defendants denied that they had cut through the plaintiffs' barrier into the plaintiffs' property or that by reason of any negligent or improper act or omission on their part any mud or water was caused to flow into the plaintiffs' colliery, or that they worked into or carried away any quantity of the plaintiffs' barrier or other coal. The defendants further denied that it was ascertained by the joint survey that they had encroached on the plaintiffs' property, or that the working of the plaintiffs' colliery had been affected, or their coal had become depreciated, by any wrongful act on the part of the defendants.

The defendants submitted that this Court had no jurisdiction to try this suit, as this suit had been instituted for the purpose of getting control of and establishing title to land outside its jurisdiction.

The suit was set down for settlement of issues. On the 25th August 1914, FLETCHER J. dismissed the suit on the ground that this Court had no jurisdiction to try the case.

His Lordship's judgment was as follows :—

"This suit is down for the settlement of issues. The suit has been brought by the plaintiff company to recover damages from the defendant company. The allegations in the plaint are that the plaintiff company and

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the defendant company are the owners of adjoining collieries. The plaintiff company, alleges that it left a barrier of 25 feet along the eastern boundary of its property as a protection for its mine. They also allege that on some date between the 16th June 1913 and the 1st of July 1913 the defendant company cut through their barrier and thereby caused a large influx of mud and water into the plaintiff company's colliery whereby the plaintiff company suffered damage. The question therefore is, has this Court jurisdiction to try a suit of this nature? It seems to me that this Court has no jurisdiction. The case is a suit for land. I cannot distinguish the present case from the decision in *Lodna Colliery Co., Ld.*, v. *Bipin Bihari Bose* (1). The material fact in this case will be whether the plaintiff company can prove the ownership of the barrier of 25 feet of coal which they allege they left along the eastern boundary of their own property. That is the basis of the cause of action, no case being set up in the plaint that the defendant company had negligently worked their own property; that being so, the decision in this case will involve the trial of the title to this barrier of 25 feet which it is alleged had been left along the eastern boundary of the plaintiff's property. That is a suit for land not within the jurisdiction of this Court under clause 12 of the Letters Patent constituting this Court. That being so, this Court has no jurisdiction to try this case. The plaint discloses no cause of action which this Court is competent to try. This suit will therefore be dismissed with costs."

From this judgment the Sudamdih Coal Co., Ld. appealed.

Mr. J. E. Bagram (with him *Mr. Buckland*), for the appellants. The decision of Fletcher J. in this case is based on his decision in *Lodna Colliery Co., Ld.* v. *Bepin Behari Bose* (1): the learned judge declined jurisdiction on the ground that in England a *clausum fregit* action was regarded as local. In *British South Africa Company* v. *Companhia de Mocambique* (2) the law was elaborately discussed and the House of Lords decided that a suit for trespass in Africa could not be instituted in England: that case however was not decided on the highly technical ground relating to venue which prevailed in England and which formerly determined that a suit for trespass

(1) (1912) I. L. R. 39 Calc. 739. (2) [1893] A. C. 602.

should be brought where the trespass took place; the Court declined jurisdiction because it did not take cognizance of foreign land laws and consequently could not recognise infringements of such laws as constituting causes of action. Now the High Court has general jurisdiction and can take cognizance of causes of action relating to land in the mofussil: this appears from the circumstance that such a suit can be transferred for trial to this Court.

[JENKINS C.J. At the time the Charter was passed the Code of Civil Procedure of 1859 was in force. The section in that Code referring to "suits for land" was subsequently replaced by similar sections in successive codes. Section 16 of the present Code describes what was meant by "suits for land."]

It is submitted that the Codes subsequent to that of 1859 varied the rule therein contained and did not enact the section in an amplified form. The mere fact that a question of title may arise for decision does not oust this Court's jurisdiction. Whether this Court has jurisdiction or not, depends on the nature of the relief sought.

[WOODROFFE J. Can you by claiming a particular form of relief by a side-wind get this Court to determine a question of title?]

There is nothing to prevent me. The Charter does not prevent this Court from trying a suit in which an issue relating to title arises. The test is whether by means of the suit the plaintiff seeks either to acquire a right or control over land or any interest in land, or to prevent the defendant from doing acts which if persisted in, will eventually deprive the plaintiff of land or some interest in land. Nearly all the authorities become reconciled if this view be adopted: *East Indian Railway Co.* v. *Bengal Coal Co.* (1),

(1) (1875) I. L. R. 1 Calc. 95.

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Delhi & London Bank v. *Wordie* (1), *Kellie* v. *Fraser* (2) where the Court enforced an award affecting land at Darjeeling, *Sreenath Roy* v. *Cally Doss Ghose* (3), which was a suit for specific performance, *Peary Mohun Ghosaul* v. *Haran Chunder Gangooly* (4), where a claim for damages for trespass to land, was held not to be a suit for land.

[JENKINS C.J. That was a Small Cause Court suit and the decision depended on the consideration of the particular sections of the Small Cause Courts Act.]

See also *Krishna Prosad Nag* v. *Maizuddin Biswas* (5), *Land Mortgage Bank* v. *Sudurudeen Ahmed* (6), which was a vendor's suit for specific performance of a contract for the sale of land and for damages for breach of such contract, where the decision turned on the nature of the relief sought, *Bapuji Raghunath* v. *Kumarji Edulji Umrigar* (7). *Crisp* v. *Watson* (8) was a decision under the Civil Procedure Code and is only an authority for the proposition that a claim for damages is not enforceable by personal obedience. If the Code requires that the infringements of rights to immoveable property should be redressed locally, it does not follow that the Charter regarded suits for compensation for infringement of such rights as suits for land. In *Bagram* v. *Moses* (9), the Court exercised jurisdiction.

[JENKINS C.J. That was a decision of the Supreme Court, which exercised the jurisdiction of an English Court.]

It has always been treated as an authority. In the case of a nuisance, this Court exercised jurisdiction,

(1) (1876) I. L. R. 1 Calc. 249.
(2) (1877) I. L. R. 2 Calc. 445.
(3) (1879) I. L. R. 5 Calc. 82.
(4) (1885) I. L. R. 11 Calc. 261.
(5) (1890) I. L. R. 17 Calc. 707.
(6) (1892) I. L. R. 19 Calc. 358.
(7) (1890) I. L. R. 15 Bom. 400.
(8) (1893) I. L. R. 20 Calc. 689.
(9) (1863) 1 Hyde 284.

though the land was in Howrah: *Rajmohun Bose* v. *East Indian Railway Co.* (1), *Halford* v. *East Indian Railway Co.* (2), *Chintaman Narayan* v. *Madhavrao Venkatesh* (3). English Courts foreclose lands outside the jurisdiction: *Paget* v. *Ede* (4). The distinction in England between local and transitory actions has no application here. The English system is highly technical. Rules regarding venue and choice of Courts in which suits should be brought were peculiar to the English system: Smith's Leading Cases, 11th edition, Vol. I, p. 608, per Lord Mansfield in *Mostyn* v. *Fabrigas* (5), also *Shelling* v. *Farmer* (6), *Lodna Colliery Co., Ld.*, v. *Bipin Behari Bose* (7) on which the decision in the present case is based is distinguishable: the question of possession was *bona fide* in issue in that case. On a proper construction of the pleadings in the present case, no question of title or possession is put in issue. The defendants deny having cut into the plaintiffs' barrier: this denial assumes that the barrier was the plaintiffs', and relates to the *factum* of cutting into it. The demarcation by boundary pillars is admitted by the defendants: the only question to be ascertained is whether the underground workings of the defendants are on this side or that of the line of pillars. In *Juggodumba Dossee* v. *Puddomoney Dossee* (8) jurisdiction was exercised on the ground that "no provision of any land is claimed and no decree bearing directly upon land or any interest in land has been given."

Even if it be held that a suit for compensation for trespass to land is a suit for land, the plaintiffs were entitled to a decree for the value of their coal removed

(1) (1872) 10 B. L. R. 241.
(2) (1874) 14 B. L. R. 1.
(3) (1869) 6 Bom. H. C. App. 29.
(4) (1874) L. R. 18 Eq. 118.
(5) (1774) 1 Cowp. 161.
(6) 1 Strange 645.
(7) (1912) I. L. R. 39 Calc. 739.
(8) (1875) 15 B. L. R. 318, 329.

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by the defendants. This is a cause of action in trover and such a suit has never been regarded as local: see Halsbury's Laws of England, Vol. XX, pp. 538, 1372, 1373, 1376, also *Powell* v. *Rees* (1). The circumstance that in order to give effect to a claim for money, the title of land may be required to be incidentally decided, does not make the suit one for land.

Sir S. P. Sinha (with him *Mr. A. K. Sinha*), for the respondents. It is true the defendants admit that the boundaries between the properties are demarcated by pillars, but the pillars are wrongly shown on the plans. The boundaries *are* in dispute. The expression "suits for land or other immoveable property" in clause 12 of the Charter has the same wide significance as in section 16 of the Code and includes all suits mentioned therein [*Nalum Lakshimikantham* v. *Krishnasawmy Mudaliar* (2)] with the possible exception of clause (*f*). A distinction is drawn between local and transitory actions in the Code—the former referring to land, the latter including other actions. Actions of a "real" nature fall within the purview of section 16 of the Code—actions of a transitory nature under section 20. At the time of the passing of the Code of 1859 and the Charter of 1861, a distinction was drawn between local and transitory action in England and it was this distinction which it was intended to impress on the Code and the Charter. "Suits for land" must mean suits of a local nature, which must be brought where the *venue* is. The principle of the distinction has greater force in this country than in England, as here the High Court has no jurisdiction over land say in Manbhoom, whereas in England, the King's Courts of Justice have jurisdiction over all land in England. In *British*

(1) (1837) 7 A. & E. 426.

(2) (1903) I. L. R. 27 Mad. 157.

South Africa Company v. *Companhia de Mocambique* (1), the plaintiffs rested their case on a claim for damages, admitting that they could not get a declaration of title to land. The suit was dismissed. This Court has no more jurisdiction over land in Manbhoom than the English Court had jurisdiction over land in South Africa. In view of the English authorities, it cannot be contended that clause 12 of the Charter cannot include the class of suits indicated by sub-clause (*e*) of the Code, namely, suits for compensation for wrong to immoveable property: see *Vaghoji* v. *Camoji* (2). The argument that so long as the Court can act *in personam*, it has jurisdiction, is unsound: even English Courts of Equity refused to recognise that doctrine. Equity did not give relief *in personam* unless priority was established by contract, fraud or trust. Section 16 of the Code reproduced the law governing the jurisdiction of the English Courts even after the extension of the Courts of Equity. The jurisdiction of the High Court on its Original Side, under clause 12 of the Charter, is the same as that of Mofussil Courts under section 16 of the Code and the same as that of English Courts. The earlier authorities are discussed in *Zulekabai* v. *Ebrahim Haji Vyedina* (3). The substantial question in dispute, in the present case, is whether the strip of coal land which the defendants are working, belongs to them or the plaintiffs. Is that not substantially a suit for land? It does not alter the nature of the suit, by the plaintiffs purporting to claim not the land, but the *price* of the land. *Ebrahim Ismail Timal* v. *Provas Chander Mitter* (4) is a direct authority for the proposition that no suit will lie where damages are claimed for trespass. The last mentioned case supplies the answer to the argument based on *assumpsit*.

(1) [1893] A. C. 602.
(2) (1904) I. L. R. 29 Bom. 249.
(3) (1912) I. L. R. 37 Bom. 494.
(4) (1908) I. L. R. 36 Calc. 59.

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[JENKINS C.J. referred to *Vinayak* v. *Krishnarao* (1).]

Kellie v. *Fraser* (2) is not in conflict with *Delhi and London Bank* v. *Wordie* (3): see Woodroffe's Civil Procedure Code, p. 157, note 4.

Mr. Bagram, in reply. In *British South Africa Company* v. *Companhia de Mocambique* (4) the reason why the House of Lords dismissed the suit was that the English Court would not assume jurisdiction in the case of an invasion of right depending on a foreign rule of law affecting land, such right being unknown to the English law: the Lord Chancellor adopted the argument of Sir H. James that it was a matter of procedure.

[JENKINS C.J. It appears to me that the test proposed by clause 12 is not one of form but one of substance. A suit brought in trespass for the purpose of having title to land tried, is a suit for land.]

In *Ilderton* v. *Ilderton* (5) the English Court entertained a suit for dower, although incidentally it had to decide the issue of the validity of a Scotch marriage: see also *Norris* v. *Chambers*(6). In passing the Charter, the Legislature intended to distinguish not between *local* and *transitory* actions, but between *real* and *personal* actions. *Whitaker* v. *Forbes* (7), *Sydney Municipal Council* v. *Bull* (8), *In re Hawthorne, Graham* v. *Massey* (9), 2 *Duder* v. *Amsterdamsch Trustees Kantoor* (10) were also referred to.

JENKINS C.J. This is an appeal from a judgment of Mr. Justice Fletcher who has dismissed the suit with

(1) (1901) I. L. R. 25 Bom. 625.
(2) (1877) I. L. R. 2 Calc. 445.
(3) (1876) I. L. R. 1 Calc. 249.
(4) [1893] A. C. 602.
(5) (1793) 126 Engl. Rep. 476.
(6) (1860) 29 Bead. 246.
(7) (1875) L. R. 10 C. P. 583.
(8) [1908] 1 K. B. 7, 12.
(9) (1883) L. R. 23 Ch. D. 743.
(10) [1902] 2 Ch. 132.

costs. This was done on a preliminary hearing upon settlement of issues, and the only question involved is whether this is a *suit for land or other immoveable property* within the meaning of clause 12 of the Letters Patent. That clause was intended to define the original jurisdiction of the High Court as to suits, and it empowered the Court "to receive, try and determine suits of every description, if, in the case of *suits for land or other immoveable property*, such land or property shall be situated . . . . . within the local limits of the ordinary original jurisdiction of the High Court."

The matter in dispute here relates to a mining property outside the jurisdiction so defined. But on behalf of the plaintiff it is contended that having regard to the pleadings it cannot be said that it is a *suit for land or other immoveable property*. The question is what was intended by that expression. It appears to me that it was not a mere formal test that was proposed—a test to be determined by the precise form in which a suit might be framed; but that regard was to be had to the substance of the suit, and I cannot help thinking that the particular expression was used, because there was its equivalent in the Civil Procedure Code of 1859, section 6. Indeed, it is a matter of common knowledge that the Secretary of State's despatch forwarding the Letters Patent to this Court makes special reference to that circumstance. The course of decisions on the Charter shows that the description cannot be limited to suits for the recovery of land in its strict sense, and as to that there can be no dispute: and, running on parallel lines with that, we find the Code of Civil Procedure of 1859 developed in 1877, so as to embrace a number of topics which perhaps would not in strictness be regarded as *suits for land*, and it is instructive to

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observe what they are. They are suits for the recovery of immoveable property (with or without rent or profits), suits for the partition of immoveable property, suits for foreclosure, or redemption of a mortgage of immoveable property, suits for the determination of any other right to or interest in immoveable property, and suits for compensation for wrong to immoveable property. This appears to me to be in accordance with principles of general if not universal, application according to which *suits for land* in its strict sense must come before the Court where the land is situate. The system on which our procedure is based, the English procedure, regards a suit for damages for trespass to land in the same way, and, it is interesting to notice that Chancellor Kent in his commentaries on American Law states that 'an injury to real property is local as to jurisdiction, and trespass on real property situated in one State cannot be sued for in another.' Therefore, it seems to me that we are not giving a construction that is opposed to the general trend of legal thought, if we hold that *suits for land* at any rate extend to a suit of this kind, which is a suit for compensation for wrong to land, when, as I hold to be the case here, the substantial question is the right to the land. In my opinion, the suit is one to which clause 12 of the Letters Patent applies in the sense I have indicated and therefore it was rightly dismissed. The appeal should therefore be dismissed with costs.

WOODROFFE J. I agree.

Appeal dismissed.

Attorneys for the appellants: *Leslie & Hinds.*

Attorneys for the respondents: *Orr, Dignam & Co.*

J. C.

APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C.J., and Woodroffe J.

SARALA SUNDARI DEBI

v.

HAZARI DASI DEBI,

AND

GOSSAIN DASI DEBI

v.

HAZARI DASI DEBI.*

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Feb. 23.

Guardian—Minor—Hindu Widow—Guardians and Wards Act (VIII of 1890), s. 7 sub-s. (3)—Appointment of guardian to a minor widow—Will—Whether before probate taken out, will may be considered in connection with appointment of guardian to a minor.

In an application for the appointment of a guardian of a minor, the Court is bound to consider a will, although probate has not been granted. The fact that there is a contest as to the validity of the will may induce the Court to exercise its discretion one way or the other, but it is not open to the Court to say it will refuse to take notice of the will.

Sayad Shahu v. *Hapija Begam* (1), *Chinnasami* v. *Hariharabadra* (2) and *Pathan Ali Khan Badlukhan* v. *Bai Panibai* (3) referred to.

APPEALS from an order of Imam J. dated the 18th February 1915 made on an application for the appointment of a guardian of the person of a minor widow, Srimati Akhoy Kumari Debi.

One Atanu Nandan Tagore, who was possessed of considerable property, died in September 1914 leaving him surviving an infant widow, Akhoy Kumari Debi, a girl between 13 and 14 years of age.

There also survived Atanu Nandan Tagore, his

* Appeals from Original Civil, Nos. 9 and 10 of 1915.

(1) (1892) I. L. R. 17 Bom. 560. (2) (1893) I. L. R. 16 Mad. 380.
(3) (1894) I. L. R. 19 Bom. 832.

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step-mother, Gossain Dasi Debi, and his father's sister's daughter, Sarala Sundari Debi.

The infant widow's mother, Hazari Dasi Debi, applied to Imam J. to be appointed guardian of the person of Akhoy Kumari Debi, the infant widow on the ground that as no probate had been obtained of an alleged will by the late Atanu Nandan Tagore, she as mother and natural guardian of the infant widow should be appointed guardian. Her application was opposed by Sarala Sundari Debi, who contended that as she and one Asutosh Bannerji were executors of the will of Atanu Nandan Tagore dated the 25th June 1914, and she had been appointed by the testator the guardian of the infant widow, she should be appointed guardian of the infant widow, although probate of the will had not yet been obtained. Gossain Dasi Debi also applied to be appointed guardian of the infant widow on the ground that as she was infant's mother-in-law, she was a fit and proper person for the guardianship.

Imam J. was of the opinion that he was not bound to consider a will of which probate had not been obtained, and, therefore, appointed Hazari Dasi Debi, the infant's mother, as the guardian of the person of the minor.

Sarala Sundari Debi and Gossain Dasi Debi appealed.

Mr. Eardley Norton (with him *Mr. Hume*), for Sarala Sundari Debi, produced a translation of the alleged will dated the 25th June 1914, and pointed out that by the ninth paragraph of the will Sarala Sundari Debi was by implication appointed guardian of the testator's infant widow, Akhoy Kumari Debi; he further argued that no express words are necessary to appoint a guardian, and referred to *Sayad Shahu* v.

Hapija Begam (1), *Chinnasami* v. *Hariharabadra* (2) and *Pathanali Khan Badlu Khan* v. *Bai Panibai* (3).

Mr. Langford James (with him *Mr. S. Ghose*) appeared on behalf of Gossain Dasi Debi.

Sir S. P. Sinha (with him *Mr. B. L. Mitter*), for the respondent, Hazari Dasi Debi, argued that it was useless to consider the directions contained in a will the validity of which was contested. The Court must therefore exercise its discretion in the appointment of a guardian of the person of the infant, and in the circumstances the mother was the natural guardian.

JENKINS C.J. AND WOODROFFE J. These are two appeals from an order appointing a guardian of a Hindu widow, aged 14. There is no power in the Court to appoint a guardian unless the Court is satisfied that it is for the welfare of the minor that the order should be passed. In support of the application there is no affidavit on which the Court can act. More than that it seems to us that, in the circumstances, the case should have waited until the return of Maharaja Tagore the head of the family in order that it might be seen whether he was willing to accede to a course which was apparently acceptable to both parties and would have solved the present difficulty. As it is, we have the curious position that an order appointing a guardian has been made on materials which do not comply with the requirements of the law, and at the same time a Rule has been issued on another application and is pending for the determination of the question whether some one else should not be appointed guardian.

The proper course now to follow is this: We set aside the order of Mr. Justice Imam and send back the

(1) (1892) I. L. R. 17 Bom. 560 (2) (1893) I. L. R. 16 Mad. 380.
(3) (1894) I. L. R. 19 Bom. 832.

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case in order that it may be re-heard by him if the petitioner thinks fit to put in proper evidence in support of her application. Her application should be heard together with the application of Mr. Langford James' client and also of Mr. Norton's client if she thinks fit to make an application; and in any case nothing should be done until the views of Maharaja Tagore have been ascertained. Finally, we think before making any order the Court must be satisfied that the application is for the welfare of the minor and that the appointment of the guardian will not infringe sub-s. *(3)* of s. 7 of the Act.

In our opinion the Judge had jurisdiction and was bound to consider that there was a will although probate had not been granted; and that appears to us to be the result of several authorities: *Sayad Shahu* v. *Hapija Begam* (1), *Chinnasami* v. *Hariharabadra* (2), and *Pathan Ali Khan Badlukhan* v. *Bai Pani Bai* (3). The fact that there is a contest as to the validity of the will may induce the Court to exercise its discretion one way or the other, as for instance, it may possibly defer deciding on the question of guardianship until the question of probate has been determined. But it is not open to the Court to say that it will refuse to take notice of the will.

We allow the appeals. The respondent will pay the costs of the appellant (Mr. Norton's client). We make no order as to the costs of Mr. James' client.

W. M. C. *Case remanded.*

Attorney for the appellant, Sarala Sundari Debi: *P. N. Sen.*

Attorney for Gossain Dasi Debi: *N. Sen.*

Attorneys for the respondent, Hazari Dasi Debi: *Manuel, Agarwalla & De.*

(1) (1892) I. L. R. 17 Bom. 560. (2) (1893) I. L. R. 16 Mad. 380.
(3) (1894) I. L. R. 19 Bom. 832.

APPELLATE CRIMINAL.

Before Mookerjee and Richardson JJ.

AMRITA LAL HAZRA AND OTHERS

v.

EMPEROR.*

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Feb. 25.

Charge—Explosive Substances Act, 1883 (46 & 47 Vict. c. 3), s. 4—Explosive Substances Act (VI of 1908), s. 4 (b)—Charge, specifications of—Accused's right to know value thereof—Penal Code (Act XLV of 1860 as amended by Act VIII of 1913) ss. 120, 120 A, 120 B, 121A—"Explosive Substance"—"By means thereof"—"Unlawfully and maliciously"—"Criminal conspiracy"—Misjoinder of charges—Criminal Procedure Code (Act V of 1898), ss. 196, 235, 342, 360 (1), 417—"Same transaction," limits of—Joinder of charges under s. 4(b) of Act VI of 1908 and s. 120B of the Penal Code—Co-conspirators, separate trial of—Crown's right to prosecute irrespective of the question of ultimate design—"Presumption of innocence" of accused, meaning of—Conspiracy, charge of—Prosecution, duty of—Explanation by accused, want of, when fatal—Leading questions—Cross-examination of its own witnesses by prosecution, when permissible—Evidence Act (1 of 1872), ss. 10, 14, 15, 54, 135, 143, 154—Official witnesses for Crown whether privileged from disclosing source of information—Detective, whether so privileged regarding place of secretion—Written statements of accused—Examination of accused—Comparison of handwriting by Court, propriety of—"Possession," meaning of—Depositions, reading over of, daily in open Court.

An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him. But where the accused fully understood the nature of the offence with which they were charged, they had clearly not been prejudiced by the omission of the words

* Criminal Appeals Nos. 587 to 590, 598, Government Appeal No. 4, and Criminal Revision No. 1293 of 1912, against the judgment of E. Panton, Additional Sessions Judge of 24-Pargannas, dated June 4, 1914.

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"unlawfully and maliciously" and "in British India" occurring in section 4 (*b*) of Act VI of 1908. Such an omission can be cured by the verdict.

The Queen v. *Munslow* (1) referred to.

Where the illegal act charged under section 120 B is the unlawful and malicious possession of explosive substances within the meaning of section 4 of the Explosive Substances Act, 1908, it is not essential to specify in the charge the explosive substance which the accused have conspired to have in their possession or under their control.

A person may be guilty of criminal conspiracy even though the illegal act, which he has agreed to do, has not been done, for "the crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means."

Reg. v. *Hibbert* (2), *Quinn* v. *Leathem* (3), *The Queen* v. *Most* (4), and *O'Connell* v. *The Queen* (5) referred to.

The indictment in all cases of conspiracy must in the first place charge the conspiracy, but in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed.

The King v. *Gill* (6), *The Queen* v. *Kenrick* (7), *The Queen* v. *Blake* (8), *Sydserff* v. *The Queen* (9), *The Queen* v. *Gompertz* (10), *Aspinall* v. *The Queen* (11), *Taylor* v. *The Queen* (12), *Reg.* v. *Parker* (13) referred to.

It is a wholesome rule that the Court should adhere to the language of the statute, as far as practicable, when a charge is drawn up; as nothing is gained by a paraphrase, while opportunity is afforded to the accused to take exception to the form of the charge.

The accused cannot be convicted on a conspiracy charge under section 120 B, Indian Penal Code, unless the prosecution establishes that the accused were members of the conspiracy after the 27th March 1913 when Act VIII of 1913 became law.

A comprehensive formula of universal application cannot be framed regarding the question whether two or more acts constitute the "*same transaction*"; the circumstances which must bear on its determination in each individual case are proximity of time, unity or proximity of place, continuity of action and community of purpose or design.

(1) [1895] 1 Q. B. 758.
(2) (1875) 13 Cox 82, 86.
(3) [1901] A. C. 495, 529.
(4) (1881) 7 Q. B. D. 244 : 14 Cox 583.
(5) (1844) 11 Cl. & F. 155 ; 1 Cox 413 ; 5 St. Tr. N. S. 1.
(6) (1818) 2 B. & Ald. 204.
(7) (1843) 5 Q. B. 49.
(8) (1844) 6 Q. B. 126.
(9) (1847) 11 Q. B. 245
(10) (1846) 9 Q. B. 824 ; 2 Cox 145.
(11) (1876) 2 Q. B. D. 48, 60.
(12) [1895] 1 Q. B. 25.
(13) (1842) 3 Q. B. 292.

If A, B and C conspire to make, or have in their possession or under their control, an explosive substance within the meaning of the Explosive Substances Act, and, if in pursuance of such conspiracy A makes or has in his possession or under his control an explosive substance, they may, if the Court thinks fit, be charged and tried together under section 120 B, Indian Penal Code, and section 4 (*b*) of Act VI of 1908.

If all the *known* co-conspirators named in the charge are not placed on their trial, the trial of some (separately) without the others is not vitiated.

Emperor v. *Lalit Mohan Chuckerbutty* (1) explained.

If the accused have committed an offence under section 4 (*b*) of the Explosive Substances Act, 1908, in pursuance of a criminal conspiracy, it is open to the Crown to prosecute them for such offences, irrespective of the question of the ultimate design of the alleged conspiracy coming under section 121 A, Indian Penal Code (which charge requires previous sanction under section 196, Criminal Procedure Code).

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

R. v. *Hodge* (2) referred to.

The presumption of innocence (in criminal cases) signifies no more than this that if the commission of a crime is directly in issue in any proceeding it must be proved beyond reasonable doubt.

"The whole doctrine when drawn out is, *first*, that a person who is charged with a crime must be *proved* guilty, that according to the ordinary rule of procedure and of legal reasoning, *presumitur pro reo*, *i.e.*, *neganti*, so that the accused stands innocent until he is proved guilty ; and *second*, that this proof of guilt must displace all reasonable doubt."

In a charge of conspiracy general evidence of the existence of the conspiracy may first be given, before particular facts are proved to show that one or more of the accused took part in it.

R. v. *Sidney* (3), *Queen Caroline's Case* (4), *R.* v. *Hunt* (5) followed.

Under the law in England facts similar, but not part of the same transaction as the main fact, are not in general admissible to prove either the occurrence of the main fact or the identity of its author except (after evidence *aliunde* on these points has been given) to show the state of mind of the parties with regard to such fact, *i.e.*, knowledge of its nature, or his

(1) (1911) I. L. R. 38 Calc. 559 ; 15 C. W. N. 593.
(2) (1838) 2 Lewin C. C. 227.
(3) (1683) 9 St. Tr. 817, 841.
(4) (1820) 2 B. & B. 284, 302, 310 ; 1 St. Tr. N. S 1348.
(5) (1820) 3 B. & Ald. 566 :

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intent. [*Vide* also, sections 14 and 15 of the Indian Evidence Act (1 of 1872).]

In general, whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake or other innocent condition of mind, evidence that the accused has been concerned in a systematic course of conduct of the same specific kind as, and proximate in point of time to that in question, may be given. *R.* v. *Holt* (1) to the contrary is no longer authority.

R. v. *Smith* (2) and *Emperor* v. *Debendra Prosad* (3) referred to.

Section 4 of Act VI of 1908 substantially reproduces the provisions of section 3 of 46 and 47 Vict. Chap. 3 (Explosive Substances Act, 1883), consequently the expression "*unlawfully and maliciously*" may be interpreted in the sense in which it is familiarly used in the criminal law of England. "*Unlawfully*" thus signifies "not for a lawful object," and "*maliciously*" signifies "intentionally and without justification or excuse or claim of right."

The Queen v. *Clemens* (4), *Miles* v. *Hutchins* (5), referred to.

Reg. v. *Ward* (6), *Mcpherson* v. *Daniels* (7), *Bromage* v. *Prosser* (8) *Clark* v. *Molyneux* (9), *Allen* v. *Flood* (10), *Johnson* v. *Emerson* (11), *R.* v. *Pembleton* (12), *Mogul Steamship Co* v. *McGregor* (13) followed.

The term "explosive substance" as used in section 4 (*b*) of Act VI of 1908 includes *any part* of an apparatus, machine, or implement intended to be used or adopted for causing or aiding in causing any explosive substance, and "by means thereof" does not mean by means thereof *alone*.

R. v. *Charles* (14) referred to.

The inference of fact may legitimately be drawn that the "explosive substances" made and possessed by Sasanka were intended for *use in British India*.

It is the duty of the prosecution, not so much to secure a conviction as to place all the available evidence in the case fairly and fully before the

(1) (1860) Bell 280 : 8 Cox 411.
(2) (1905) 20 Cox 804 ; 92 L. T. 208.
(3) (1909) I. L. R. 36 Calc. 573 ; 9 C. L. J. 610.
(4) [1898] 1 Q. B. 556 ; 19 Cox 18.
(5) [1903] 2 K. B. 714 ; 20 Cox 555.
(6) (1872) 12 Cox 123 ; L. R. 1 C. C. R. 356, 360.
(7) (1829) 10 B. & C. 272.
(8) (1825) 4 B. & C. 247.
(9) (1877) 3 Q. B. D. 237.
(10) [1898] A. C. 1.
(11) (1871) L. R. 6. Ex. Ch. 373.
(12) (1874) L.R. 2 C. C. R. 119, 122 ; 12 Cox 607.
(13) [1892] A. C. 25 ; 23 Q. B. D. 598.
(14) (1892) 17 Cox 499.

tribunal by which alone the guilt or innocence of the accused is to be determined.

Ram Ranjan Roy v. *King-Emperor* (1) following *Regina* v. *Holden* (2) referred to.

"The proof of the case against the prisoner must depend for its support not upon the absence or want of any explanation on the part of the prisoner, but upon the positive affirmative evidence of his guilt that is given by the Crown." But "if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon, for his own sake and his own safety, to state and to bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence."

Tindal C.J. in *Regina* v. *Frost* (3) followed.

While it is not necessary to prove manual possession of the explosive substance by the accused, it must be proved that it was in his power or control: *possession* to be punishable must also be possession with knowledge and assent. The mere fact that the other accused were in the room does not show they were in possession of all or any of the things contained therein.

When the evidence at the disposal of the prosecution is insufficent to secure a conviction for the crime committed, it is inexpedient, even though it may be lawful, to prosecute the accused for a conspiracy the proof whereof really rests on the establishment of that very crime.

Reg. v. *Boulton* (4) and *Emperor* v. *Lalit Mohan* (5) referred to.

A man's guilt is to be established by proof of the facts alleged and not by proof of his character; such evidence might create a prejudice but not lead a step towards substantiation of guilt.

[*Vide* section 54 of the Indian Evidence Act.]

In India, as in England, the accused are entitled in cross-examination to elicit facts in support of their defence from the prosecution witnesses wholly unconnected with the examination-in-chief. In the course of cross-examination of this character the defence are entitled, in view of the generality of section 143 of the Indian Evidence Act, to ask leading questions. Under section 154 the Court has the discretion to permit the prosecution to test, by way of cross-examination, the veracity of their own witnesses with regard to the (unconnected) matters elicited by the defence in cross-examination.

(1) (1914) I. L. R. 42 Calc. 422; 19 C. W. N. 28.
(2) (1838) 8 C. & P. 606. 609.
(3) (1839) 4 St. Tr. N. S. 85, 443.
(4) (1871) 12 Cox 87, 92.
(5) (1911) I. L. R. 38 Calc. 559; 15 C. W. N. 593, 606.

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[While in the United States a party has no right to cross-examine any witness, except as to circumstances connected with matters stated in his examination-in-chief, and if he wishes to examine him respecting other matters he must do so by making him his own witness and by calling him as such in the subsequent progress of the cause.

Taylor on Evidence, Art. 1432, and *Philadelphia and Trenton Railway Co.* v. *Stimpson* (1) referred to.]

The defence is not entitled to elicit from individual prosecution witnesses whether he was a spy or an informer, or to discover from police officials the names of persons from whom they had received information; but a detective cannot refuse, on grounds of public policy, to answer a question as to where he was secreted.

R. v. *Watson* (2), *R.* v. *Richardson* (3), *A.-G.* v. *Bryant* (4), *Marks* v. *Beyfus* (5), *Webb* v. *Catchlove* (6) referred to.

In strictly carrying out the provisions of section 360 (*1*) of the Criminal Procedure Code by the daily reading over in open Court of the deposition of each witness, the Court does not lay itself open to criticism, though that procedure should occupy considerable time.

Mohendra Nath v. *Emperor* (7), *Jyotish Chandra Mukerjee* v. *Emperor* (8), and *Kamatchinathan* v. *Emperor* (9) referred to.

Though written statements may be accepted from the accused in accordance with the universal practice in the Courts under the Calcutta High Court, they do not take the place of evidence nor of such examination of the accused as is contemplated by section 342 of the Code of Criminal Procedure.

Emperor v. *Ansuiya* (10) dissented from.

With reference to the facts of this case :—

Held, (*i*) that the articles found in the present case must be deemed "explosive substances" within the meaning of that statute :

(*ii*) that the bomb on the construction whereof Sasanka was engaged was not intended for a lawful object and there could be no controversy that his act was intentional ; and that Sasanka's conviction must be upheld : but the maximum sentence should be reserved for offence of even a worse description which, it was not difficult to imagine, might fall within the scope of the Explosive Substances Act :

(1) (1840) 14 Peter 448.
(2) (1817) 32 St. Tr. 1, 100.
(3) (1863) 3 Fos. & Fin. 693.
(4) (1846) 15 M. & W. 169; 71 R. R. 610.
(5) (1890) 25 Q. B. D. 494.
(6) (1886) 3 T. L. R. 159.
(7) (1908) 12 C. W. N. 845.
(8) (1909) I. L. R. 36 Calc. 955.
(9) (1904) I. L. R. 28 Mad. 308.
(10) (1903) All. W. N. 1.

(*iii*) that evidence was inadmissible to prove the dishonourable purpose for which Khagendra's false name was assumed :

(*iv*) that the evidence on the record of association with Pulin Behary Das and the Anusilan Samity were irrelevant, for the purpose of proof of the conspiracy charged in that case, and should not have been admitted :

(*v*) that the expression "*Mayer lila*" had in itself no evil significance, and was frequently used by a person in distress who found all effort unavailing and realised how inscrutable were the ways of Providence :

(*vi*) that an abstract philosophical disquisition on *Yoga* could not rightly be cut up into isolated sentences and edited so as to furnish a possible text for revolutionary spirits, without positive proof that it was so used :

(*vii*) that the fact that the name of Dinesh appeared in a list found at the search of the house of one Madan Mohan Bhoumick (of whom nothing was known) was not only valueless but not admissible against the accused, being irrelevant for the purposes of the trial :

(*viii*) that since the cypher list was not put to the witness who had been called to prove Dinesh's handwriting on two post cards and who had been shown that cypher list by the police outside Court, the defence could make the legitimate comment that that was because he had failed to recognize the handwriting, and the Sessions Judge should not have proceeded in his judgment to compare that document with the writing on the post cards with a view to determine whether it was in the handwriting of Dinesh.

Barindra Kumar Ghose v. *Emperor* (1) and *Kurali Prasad Misser* v. *Anantaram Hajra* (2) referred to.

(i) Appeals by each of the five accused—Amrita Lal Hazra, *alias* Sasanka, and four others.

(ii) Government Appeal (No. 4 of 1914) by the Superintendent and Remembrancer of Legal Affairs Bengal, against the acquittal of Khagendra Nath Chowdhury, accused.

(iii) Criminal Rule No. 1293 of 1914 (for enhancement of sentence on all the accused) obtained by the Superintendent and Remembrancer of Legal Affairs, Bengal, petitioner.

The facts of the case (commonly known as the

(1) (1909) I. L. R. 37 Calc. 467, 503 ; 14 C. W. N. 1114, 1138. (2) (1871) 8 B. L. R. 490, 502 ; 16 W. R. (P.C.) 16.

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"Raja-Bazar Bomb case"), out of which these appeals arose, were very briefly as follows:—

Amrita Lal Hazra *alias* Sasankasekhar Roy, Dinesh Chandra Das Gupta, Sarada Charan Guha and Chandrasekhar De were charged with having had in their possession under their control in a room in No. 296-1, Upper Circular Road, on the 21st November, 1913, materials for making bombs with intent by means thereof to endanger life and with having thereby committed an offence punishable under section 4 (*b*) of the Explosive Substances Act (VI of 1908). These four accused together with Upendra Lal Roy Chowdhury *alias* Kalipada Ghosh, and Khagendra Nath Choudhury *alias* Suresh Chandra Choudhury were further charged with conspiring between March 1911 and the 21st November 1913 with Satis Chandra Chakravarty *alias* Satis Chandra Bhattacharjya, Bhupendra Nath Sen, Profulla Ranjan Gupta, Joges Chandra Roy, Nirmal Kanta Roy, a person known as Biroja and other unknown persons to make and keep explosive substances with intent by means thereof to endanger life or make other persons to endanger life, thereby committing an offence punishable under section 120 B of the Indian Penal Code. On the 21st February 1914, Mr. H. M. Veitch, Joint Magistrate of 24-Parganas, had committed the above six accused to take their trial before the Court of Sessions, after discharging the 7th accused, Hiranmoy Banerji. Mr. E. B. H. Panton, Additional Sessions Judge, 24-Parganas, tried the case with the aid of two assessors, Babus Pratap Chandra Chaudhuri and Basanta Kumar Chakrabarti.

The accused with the exception of Sasankasekhar had declined to make any statement to the committing Magistrate, Mr. H. M. Veitch. In the Sessions Court they disclosed nothing orally but filed lengthy

written statements after the close of the case for the prosecution. Put shortly, the case of Sasankasekhar was that the articles found in his room were not intended for bombs and there was no seditious literature there. The three accused, Dinesh, Saroda and Chandrasekhar who were found in his room admitted having been there but stated that they were there for an innocent purpose. Kalipada denied having had anything to do with leaflets; and all denied having been members of any conspiracy. Both the assessors in separate lengthy written opinions, arrived at the conclusion that all the accused should be acquitted. On the 4th June 1914, Mr. E. Panton, the Additional Sessions Judge, 24-Pergannas, agreeing with both assessors acquitted Khagendra Nath Chaudhury, but disagreeing with both assessors convicted the five remaining accused under section 120 B, Indian Penal Code, and sentenced them to transportation for 10 years. He also convicted Sasanka, Dinesh, Sarada and Chandrasekhar under section 4 (*b*), Act VI of 1908 and sentenced Sasanka to 15 years' transportation, and the other three to 10 years' transportation, the sentences being concurrent. Thereupon each of the accused preferred a separate appeal to the Hon'ble High Court assailing his conviction as being contrary to law and to the evidence on the record. The Crown preferred an appeal under section 417 of the Criminal Procedure Code against the acquittal of Khagendra, and also obtained a Rule against all the five accused for enhancement of sentence. These appeals were consecutively heard by a Special Bench consisting of the Hon'ble Sir Asutosh Mookerjee, and the Hon'ble Thomas William Richardson, two of the Judges of the High Court. The fundamental question on the merits related to the true nature of Exhibits I, V, VI, and VII empty

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cigarette tins, etc., iron discs and clamps, wire, etc., the accused maintaining that these articles were used by Sasanka in experiments towards the construction of a cheap acetylene generator, while the prosecution insisted that they constituted materials for the preparation of bombs. On or about the 16th April 1914 a model lamp had been prepared by a tinsmith under instruction from Sasanka (then in jail) conveyed through his pleader. With the article so constructed Sasanka gave a successful exhibition in the Sessions Court on 14th May 1914. Counsel for the Crown also gave a successful demonstration using an ordinary teapot to generate gas for the light. In the High Court both the demonstrations were repeated by Mr. S. K. Sen, Counsel for Sasanka, and Mr. Pugh, Counsel for the Crown. The hearing lasted 32 days from 7th December 1914 to 4th February 1915, the judgment of the Court being delivered by Mookerjee J. on 25th February 1915.

Mr. C. Bagram (with him *Mr. S. K. Sen*, *Mr. H. K. Ghosh*, *Babu Sasadar Roy*, *Babu Kshitish Chandra Neogy* and *Babu Bhudeb Chandra Roy*), for the accused Chandra Sekhar, after arguing on the merits with regard to the whole case and the accused Chandra Sekhar in particular, dealt with the objections of law under the following main heads :*—

First—The charge under section 4 (*b*) of Act VI of 1908 is materially defective, inasmuch as it omits to state (*i*) that the accused were in possession of explosive substances or had them under their control "*unlawfully and maliciously*"; (*ii*) that it was the intent of the accused to endanger life "*in British India.*"

* The arguments of counsel on both sides are given in detail in the judgment of the Court.

Second—The charge under section 120B, Indian Penal Code is bad, because it does not specify the explosive substance which, it is alleged, the accused had conspired with one another and with other persons to make and keep.

Third—The conspiracy charge under section 120B, Indian Penal Code, is bad, the period between March 1911 and the 21st November being specified, whereas sections 120A, and 120B, did not exist before 27th March 1913.

Fourth—The joint trial is illegal on the ground of misjoinder of charges for, while only four accused are charged with an offence under section 4 (*b*) of Act VI of 1908, all the accused are charged with conspiracy under section 120B, Indian Penal Code.

Fifth—The trial is illegal as the persons whose names are mentioned in the charge as co-conspirators have not been prosecuted, for if this procedure is allowed, there may be an inducement to the prosecution to indiscriminately mention the names of persons as co-conspirators simply with a view to let in evidence under section 10 of the Indian Evidence Act, which would otherwise be inadmissible.

Sixth—The facts disclosed, if believed, indicate the commission of an offence under section 121A, Indian Penal Code, but the prosecution has been commenced under section 120B, Indian Penal Code, with a view to evade the requirements of section 196, Criminal Procedure Code, compliance wherewith is imperative in prosecutions for offences against the State.

Seventh—The admissibility of evidence of previous association (*i.e.*, prior to 27th March 1913 when Act VIII of 1913 was passed), viz., with regard to the Anusilan Samity of Dacca in 1908, and also with regard to the previous history of the accused.

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Eighth—Regarding important questions of law in connection with the procedure adopted in the Court below with regard to the examination of the witnesses and of the accused, viz., (*i*) leading questions in cross-examination, (*ii*) cross-examination of its own witnesses by prosecution, (*iii*) discovering from police witnesses source of information, (*iv*) daily reading over in open court of depositions of witnesses, (*v*) value of written statements filed by accused.

Mr. K. B. Dutt (with *Mr. N. Sen* and *Babu Probodh Kumar Das*), for the accused Kalipada followed and argued on the merits of the case made out against his client only.

Mr. S. K. Sen (with *Mr. P. Banerjee*, *Babu Manmatha Nath Mookerjee* and *Babu Birendra Kumar De*), for the accused Sasankasekhar, followed, and after arguing on the merits of his client's case, briefly touched upon the questions of law connected therewith and adopted *Mr. C. Bagram's* arguments.

Mr. C. R. Das (with *Mr. S. C. Roy*, *Babu Kshitish Chandra Neogy* and *Babu Prokash Chandra Mazumdar*), for the accused Dinesh, followed and argued in great detail all the questions of law with regard to the case in general and his client in particular, under the following main heads :—

(*i*) Whether there was a valid charge of conspiracy.

(*ii*) Whether there was sufficient evidence to convict the accused.

(*iii*) The question of jurisdiction, for if the conspiracy was one to wage war against the King, the Sessions Judge has no jurisdiction to try the case, the charge being really under section 121A, Indian Penal Code, as there was no complaint under section 196 of the Criminal Procedure Code.

(*iv*) Question of misjoinder of charges.

Mr. S. K. Sen for *Babu Manmatha Nath Mookerjee*

(with him *Babu Bhudeb Chandra Roy* and *Babu Asitaranian Chatterjee*), for the accused Saroda, followed, dealing with the facts connected with the case against his client and also very briefly touching upon the question of law arising in connection therewith.

On the Court desiring to hear Mr. C. R. Das further on the law:

Mr. Nisith Sen, for *Mr. C. R. Das* (who was engaged elsewhere), followed, and argued in great detail regarding the scheme of the Explosive Substances Act (VI of 1908), its definitions and the construction of sections 3, 4 and 5 thereof: and also the definition and meaning in law of the terms "unlawfully and maliciously," "possession" and "by means thereof."

[This closed the case for the defence.]

Mr. Pugh (with *Mr. N. Gupta*, *Babu Hemendra Nath Mitra* and *Babu Nerode Chandra Chatterjee*), for the Crown, in all the above five appeals, dealt in detail with all the objections both of facts and the law raised by the appellants contending that all the accused had been rightly convicted, and further urged that the lengthy written statements filed by the accused were not evidence in the case, and that the Sessions Judge was perfectly justified in permitting the Crown to cross-examine certain of the prosecution witnesses, and he followed the right procedure in having the depositions daily read over by each witness in open court in the presence and in the hearing of each accused.

Mr. C. Bagram, then replied for the accused on the facts and on the question of the admissibility of evidence of previous association.

[This closed the hearing of the five appeals preferred by the accused.]

Mr. Pugh (with him *Mr. N. Gupta*, *Babu*

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Hemendra Nath Mitra and *Babu Nerode Chandra Chatterjee*), for the Crown in Government appeal No. 4 of 1914, dealt with the facts and contended that on the merits the acquittal of Khagendra by the Sessions Judge was erroneous.

Mr. C. Bagram (with him *Mr. S. K. Sen*, *Babu Kshitish Chandra Neogy*, *Babu Birendra Kumar De*, and *Babu Hem Chandra Mazumdar*), for the opposite party, Khagendra, was not called upon to reply.

Criminal rule No. 1293 of 1914, for enhancement of sentence, (*Mr. Pugh* and others for Crown and *Babu Asitaranjan Chatterjee* for one of the accused, viz., Saroda), was not argued.

Cur. adv. vult.

MOOKERJEE AND RICHARDSON JJ. On the 21st of November 1913, during the early hours of the morning, in execution of a warrant issued by the Deputy Commissioner of Sylhet, a search was made of a room rented and occupied by one Sasankasekhar Hazra, *alias* Amrital Hazra, at 296-1, Upper Circular Road, in the eastern suburbs of Calcutta. The search warrant authorised the Commissioner of Police to search the premises for explosives, letters and documents in connection with a bomb outrage committed at Moulvi Bazar, on the 27th March 1913. At the search, the police arrested Sasankasekhar Hazra, as also three other persons, Dinesh Chandra Das Gupta, Chandra Sekhar De, and Saroda Charan Guha, who were found asleep inside the room. The police found in the room various articles and papers, and amongst others a tobacco tin fitted with three iron discs (two inside and one outside) and four iron clamps, another tin of similar size, four clamps made to fit the second tin, and other discs and clamps, finished and unfinished. According to the prosecution, these articles were made for use as the envelope or shell of a lethal bomb. On

the 23rd November, J. N. Ghosh, the Police Officer to whom the warrant had been endorsed for execution, gave the first information, in which it was alleged that the four persons arrested had committed offences under sections 4 and 5 of the Explosive Substances Act, 1908. On the 26th November, the District Magistrate transferred the case for disposal to Mr. Veitch. On the 6th December, one Kalipada Ghosh *alias* Upendralal Rai Choudhury, was arrested in College Street with ten copies of a seditious leaflet, called Liberty Leaflet, of which two were on pink paper and the other eight on white paper. On the 26th January, 1914, one Khagendra Nath Choudhury *alias* Suresh Chandra Choudhury, was arrested in a house at Baranagore, in the northern suburbs of Calcutta. Meanwhile, search warrants had been executed in various places and information gathered as to the antecedents of the persons in custody. The original proceedings, commenced on the 23rd November, were then withdrawn by the Public Prosecutor under Section 494, Criminal Procedure Code, and the four persons arrested on the 21st November, were discharged on the 19th January, 1914. At the same time, a fresh complaint was made in which Sasanka, Dinesh, Saroda, Chandra Sekhar, Kalipada and, Khogen, along with one Hiranmoy Banerjee, who had been in the interval arrested at Benares were charged under Sections 4, 5 and 6 of the Explosive Substances Act as also under Section 120-B of the Indian Penal Code. The consent of the Local Government required by section 7 of the Explosive Substances Act, 1908, was also duly obtained. The Magistrate held that the case against Hiranmoy Banerjee had not been established and discharged him. The other six accused were committed to take their trial in the Court of Session. The first charge against them was to the effect that

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Sasanka, Dinesh, Saroda and Chandra Sekhar, on or about the 21st November, 1913, at 296-1, Upper Circular Road, had in their possession or under their control explosive substances, to wit, Exhibits I, V, VI, VII and other exhibits, all materials for the creation of bombs, with intent by means thereof to endanger life and had thereby committed an offence punishable under Section 4 (*b*) of the Explosive Substances Act, 1908. The second charge was to the effect that Sasanka, Dinesh, Saroda, Chandra Sekhar, Kalipada and Khagendra, between March, 1911, and 21st November, 1913, at 296-1, Upper Circular Road, and other places in British India had conspired, with one another and other persons, to wit, Biroja, Satish Chandra Chakravarty, Bhupendra Nath Sen, Profulla Ranjan Gupta, Jogesh Chandra Roy, Nirmal Kanta Roy and other persons to make and keep explosive substances with intent by means thereof to endanger life or enable other persons to endanger life, an offence punishable under Section 4 (*b*) of the Explosive Substances Act, 1908, and had thereby committed an offence punishable under Section 120-B of the Indian Penal Code. The Sessions Judge, after an elaborate trial with the aid of Assessors, with whose opinion he disagreed, except in the case of Khagendra, came to the conclusion that Sasanka, Dinesh, Saroda and Chandra Sekhar, were guilty under Section 4 of Act VI of 1908, and that Sasanka, Kalipada, Dinesh, Saroda and Chandra Sekhar were guilty under Section 120-B of the Indian Penal Code. Under Section 4 of Act VI of 1908, he sentenced Sasanka to transportation for fifteen years, and each of the other three, Dinesh, Saroda and Chandra Sekhar, to transportation for ten years. Under section 120-B of the Indian Penal Code, he sentenced Sasanka, Kalipada, Dinesh, Saroda and Chandra Sekhar, each to transportation for ten years.

He further directed the sentences under the two sections to run concurrently. As regards Khagendra, he accepted the opinions of the Assessors and acquitted him. Against the order of the Sessions Judge, five appeals have been preferred, one by each of the accused persons who has been convicted, Another appeal has been preferred by the Crown against the acquittal of Khagendra A rule has also been obtained by the Crown for enhancement of the sentences upon the five accused who have been convicted by the Sessions Judge. The appeals and the rule have been exhaustively argued in this Court during 32 days, and the questions of law and fact which arise therein have been discussed from every conceivable point of view. Since the close of arguments we have again minutely scrutinised the papers on the record, and we now proceed to record our decision.

On behalf of the five accused who have been convicted, the order of the Sessions Judge has been assailed as contrary to law and to the evidence on the record. We shall first examine the grounds upon which the legality of the trial has been called in question. But before we do so, it is necessary to set out the relevant portions of the sections under which the accused have been convicted.

Section 4 (*b*) of the Explosive Substances Act, 1908, is in these terms :—

"Any person who unlawfully and maliciously makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life, or cause serious injury to property in British India, or to enable any other person by means thereof to endanger life or cause serious injury to property in British India, shall, whether any explosion does or does not take place and whether any injury to person or property has been actually caused

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or not, be punished with transportation for a term which may extend to twenty years, to which fine may be added, or with imprisonment for a term which may extend to seven years, to which fine may be added."

Section 120 A, which was introduced into the Indian Penal Code by Act VIII of 1913, is in these terms:—

"When two or more persons agree to do, or cause to be done (i) an illegal act, or (ii) an act, which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement to commit an offence shall amount to a criminal conspiracy, unless some act, besides the agreement, is done by one or more parties to such agreement in pursuance thereof.

Explanation: It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."

Section 120B provides the punishment for criminal conspiracy.

In the first place, it has been argued on behalf of the accused, that the charge under Section 4 (*b*) of Act VI of 1908 is materially defective, inasmuch as it omits to state, *first*, that the accused were in possession of explosive substances or had them under their control "unlawfully and maliciously," and, *secondly*, that it was the intent of the accused to endanger life in "British India." In our opinion, the defects in this charge have not vitiated the trial and conviction, and that the case is covered by Section 225 and by clause (*a*) of Section 537, Criminal Procedure Code. It is worthy of note that the objection was not taken before the Sessions Judge and regard must be had to this circumstance, to determine whether the omissions mentioned have in fact occasioned a failure of justice. An accused is entitled to know with certainty and

accuracy the exact value of the charge brought against him, for, unless he has this knowledge he may be seriously prejudiced in his defence. In the present case, the law and the section of the law against which the offence is alleged to have been committed were specifically mentioned in the charge, as required by clause (*4*) of Section 221, Criminal Procedure Code, and under clause (*5*), the fact that the charge was made was equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case. The accused fully understood the nature of the offence with which they were charged and had clearly not been prejudiced by the omission. The view we take is in accord with that adopted in *The Queen* v. *Munslow* (1) where Lord Russell, C. J., observed that it would be a deplorable, if not an absurd state of the the law if such an omission could not be cured by verdict. The first objection must consequently be overruled.

In the second place, it has been contended that the charge under Section 120B, Indian Penal Code, is bad, because it does not specify the explosive substance which, it is alleged, the accused had conspired with one another and with other persons to make and keep. The substance of the argument is that to make and keep explosive substances generally is not an offence which, it is contended, means according to section 4, clause (*o*) of the Criminal Procodure Code, "any act or omission made punishable by any law for the time being in force," and according to the second paragraph of section 40, Indian Penal Code, denotes, "a thing punishable under that Code or under any special or local law," as defined in sections 41 and 42. Reference

(1) [1895] 1 Q. B. 758.

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has also been made to section 10 of the Indian Evidence Act, where the expression is used, "two or more persons have conspired together to commit an offence or an actionable wrong." Reliance has been placed in support of the contention of the accused on the decisions in *The King* v. *Biers* (1), *The Queen* v. *Parker* (2), *O'Connell* v. *The Queen* (3), *The King* v. *Mason* (4), and *The Queen* v. *Mckenzie* (5). Stress has also been laid upon the cases of *Behari* v. *Queen-Empress* (6), and *Poresh* v. *Emperor* (7). We are unable to accept as well-founded the contention of the accused that where the illegal act, charged under Section 120B, is the unlawful and malicious possession of explosive substances within the meaning of Section 4 of the Explosive Substances Act, 1908, it is essential to specify in the charge the explosive substances which the accused have conspired to have in their possessions or under their control. It is indisputable that a person may be guilty of criminal conspiracy, even though the illegal act which he has agreed to do or cause to be done has not been done. As was observed by Cleasby B. in *Reg.* v. *Hibbert* (8), conspiracy differs from other charges in this respect, that in other charges the intention to do a criminal act is not a crime of itself until something is done amounting to the doing or attempting to do some act to carry out that intention; conspiracy, on the other hand, consists simply in the agreement or confederacy to do some act, no matter whether it is done or not. We very often get facts sufficient to establish the guilt of parties to a conspiracy other than acts which have

(1) (1834) 1 A. & E. 327.
(2) (1842) 3 Q. B. 292.
(3) (1844) 11 Cl. & F. 155.
(4) (1788) 2 T. R. 581.
1 Leach 487; 2 East P. C. 837.
(5) [1892] 2 Q. B. 519; 17 Cox 542.
(6) (1884) I. L. R. 11 Calc. 106.
(7) (1905) I. L. R. 33 Calc. 295.
(8) (1875) 13 Cox 82, 86.

been done in pursuance of it. Baron Cleasby then gives an example: "there may be a conspiracy to set fire to London at different places at once, and that conspiracy may be fully proved, though no part of London has in fact been set on fire, inasmuch as the crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means": *Quinn* v. *Leathem* (1). Reference may also be made to the decision in *The Queen* v. *Most* (2), where it was ruled that the accused who had published an inflammatory article in a newspaper not addressed to any individual in which he recommended the murder not of any specified individual, but of crowned or uncrowned heads of States from Constantinople to Washington, was guilty of misdemeanour under section 4 of 24 and 25 Vict. C. 100. If the contention of the accused in the case before us were well-founded, there could be no prosecution for a conspiracy to commit murders or dacoities till a murder or dacoity had been actually committed in pursuance of the conspiracy, though it might be conclusively proved that the conspiracy had been formed, even before a single overt act was done. The gist of the offence is in the conspiracy or agreement, and if the offence goes no further, it may not be possible to say what murders or dacoities it is proposed to commit, or in a case such as that before us, what particular explosives the accused intend to obtain [see Russell on Crimes, 1909, Vol. I, p. 187, foot-note (*g*)]. The decisions to which our attention has been drawn do not assist the contention of the accused. In *R.* v. *Biers* (3), the objection to the indictment was upheld on the ground that it misrecited an Act of Parliament [2 Hawkins, P. C. BK. II, Chapter XXV,

(1) [1901] A. C. 495, 529.

(2) (1881) 7 Q. B. D. 244; 14 Cox. 583.

(3) (1834) 1 A. & E. 327.

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Section 104]. *The King* v. *Mason* (1) is an authority for the proposition that an indictment for obtaining property by a false pretence must not only expressly allege that the pretence was false, but also set out the false pretence sufficiently: *Reg.* v. *Oates* (2), *R.* v. *Henshaw* (3). But it is worthy of note that although an indictment, which omits to set out the particular false pretence alleged, is held bad, where the objection is taken before verdict, if no such objection is taken and there is a verdict of guilty on such an indictment, the defect is deemed cured by verdict: *Reg.* v. *Goldsmith* (4), *Heymann* v. *The Queen* (5). It is further well settled that it is not necessary to set out the false pretences in an indictment for a conspiracy to obtain goods by false pretences or for receiving goods obtained by false pretences; in other words, that the indictment in all cases of conspiracy must, in the first place, charge the conspiracy, but that in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed: *The King* v. *Gill* (6), *The Queen* v. *Kenrick* (7), *The Queen* v. *Blake* (8), *Sydserff* v. *The Queen* (9), *The Queen* v. *Gompertz* (10), *Aspinall* v. *The Queen* (11), *Taylor* v. *The Queen* (12), *R.* v. *Parker* (13) is an authority only for the proposition that where the indictment charged the accused with conspiracy to obtain by false pretences divers goods and merchandise the Prosecutor was bound to state whose the goods and merchandise were, as otherwise he might make an indefinite statement and

(1) (1788) 2 T.R. 581; 1 Leach 487; 2 East P. C. 837.
(2) (1855) Dears. C. C. 459.
(3) (1864) Le & Ca. 444.
(4) (1873) 2 C. C. R. 74.
(5) (1873) L. R. 8 Q. B. 102.
(6) (1818) 2 B. & Ald. 204.
(7) (1843) 5 Q. B. 49.
(8) (1844) 6 Q. B. 126.
(9) (1847) 11 Q. B. 245.
(10) (1846) 9 Q. B. 824; 2 Cox 145.
(11) (1876) 2 Q. B. D. 48, 60.
(12) [1895] 1 Q. B. 25.
(13) (1842) 3 Q. B. 292.

lie in wait for whatever might come out in the evidence. In *C'Connell* v. *The Queen* (1), Tindal, C.J., observed as follows: "the crime of conspiracy is complete, if two or more than two should agree to do an illegal thing, that is to effect something in itself unlawful or to effect by unlawful means something which in itself may be indifferent or even lawful. It has accordingly been always held to be the law that the gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not." The Lord Chief Justice then proceeded to state, with reference to two of the counts to which exception had been taken, that in the opinion of the Judges those counts did not state the illegal purpose and design of the agreement entered into between the defendants, with such proper and sufficient certainty as to lead to the necessary conclusion that it was an agreement to do an act in violation of the law. The act imputed to the defendants was "intimidation," and with reference thereto, the Lord Chief Justice observed that as the word was not a technical term, not *vocabulum artis*, having a necessary meaning in a bad sense, it was essential to make clear from the context what species of fear was intended or upon whom such fear was intended to operate. This view was confirmed by the House of Lords. Lord Campbell observed that the counts of the indictment which stated general conspiracies to effect changes in the government and repeal of the legislative union by intimidation and display of physical force, were bad, because they gave the defendant no information of the specific offence, which they had to answer. In *The Queen* v. *McKenzie* (2), where a person was

(1) (1844) 11 Cl. & F. 155, 233, 235; 1 Cox 413; 5 St. Tr. N. S. 1. (2) [1892] 2 Q. B. 519; 17 Cox 542.

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prosecuted under Section 7, 38 and 39 Vict., Chap. 6, for intimidating another person with a view to compel him to abstain from doing an act which that other person had a legal right to do, it was held that the conviction was bad, as the summons did not set out the particular acts alleged to be illegal. The cases reviewed are clearly distinguishable and do not support the contention that when the illegal act contemplated by section 120-A, Indian Penal Code, is the possession of explosive substances under section 4 (*b*) of the Explosive Substances Act, 1908, it is essential to specify in the charge the particular substance which the accused have conspired to make or have in their possession or under their control. There is, further, plainly no analogy between the case before us and the class of cases of which *Behari* v. *Queen-Empress* (1), and *Poresh* v. *Emperor* (2), may be taken as the types, where it has been ruled that the charge in a prosecution for unlawful assembly must specify the common object. We are clearly of opinion that the conspiracy charge is not open to objection on the ground that it does not specify the explosive substances for the preparation or possession whereof the alleged conspiracy was formed. We observe, however, that the charge does not follow the language of section 4 (*b*) of Act VI of 1908, and uses the expression "make and keep" explosive substances, while it omits the expressions "unlawfully and maliciously," and "British India." It is a wholesome rule that the Court should adhere to the language of the Statute as far as practicable, when a charge is drawn up; nothing is gained by a paraphrase, while opportunity is afforded to the accused to take exception to the form of the charge. We hold accordingly that there is no

(1) (1884) I. L. R. 11 Calc. 106. (2) (1905) I. L. R. 33 Calc. 295.

force in the second contention, which must accordingly be overruled.

It has been argued in the third place that the conspiracy charge under section 120-B, Indian Penal Code, is bad, inasmuch as it assigns a wrong date for the commencement of the period during which the conspiracy charged against the accused lasted. The charge specified the period as contained between March, 1911, and the 21st November, 1913. It is pointed out that sections 120-A and 120-B did not find a place in the Indian Penal Code before the 27th March, 1913, when Act VIII of 1913 became law. It is obvious that the period should have been restricted between the dates 27th March and 21st November, 1913. Under section 222 (*l*), Criminal Procedure Code, particulars as to the time of the alleged offence were necessary and the prosecution should have been careful in this respect. No objection to the charge on this ground was, however, taken at the trial till a very late stage of the proceedings, in fact only in the course of the final arguments, and the error cannot be deemed to have affected the legality of the trial. No doubt the accused cannot be convicted unless the prosecution establishes that the accused were members of the conspiracy after the 27th March, 1913, but this involves an investigation of the merits of the case. The third ground thus turns out to be unsubstantial and must be overruled.

In the fourth place, the legality of the trial has been questioned on the ground of misjoinder of charges. The substance of the argument is that while four of the accused persons are charged with an offence under section 4 (*b*) of Act VI of 1908, all the six accused are charged with conspiracy under section 120-B, Indian Penal Code, and it is contended that a joint trial of all these persons for the two offences charged is illegal, on the authority of the

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decision of the Judicial Committee in *Subrahmania* v. *King-Emperor* (1). It cannot be disputed that if misjoinder of charges is established the trial must be deemed illegal because held contrary to an express provision of the law relating to the mode of trial. The real question in controversy is whether there has been a misjoinder of charges in the case before us. On behalf of the accused, it has been contended that the same individual cannot be simultaneously charged with an offence as also with conspiracy to commit that offence, and much less can he be tried jointly with other persons alleged to be his co-conspirators. In support of this view, reliance has been placed upon *King-Emperor* v. *Tirumal* (2). This decision is however of no real assistance to the accused; it is an authority only for the proposition that a man cannot be cumulatively charged with the commission of an offence, as also of abetment by conspiracy or otherwise of the very same offence; it is besides, a decision given before Section 120-B, Indian Penal Code, was enacted. In our opinion the legality of the trial in the present case must be determined with reference to the language of Section 239 of the Criminal Procedure Code, which so far as it is relevant to the question before us, is in these terms:—"When more persons than one are accused of different offences committed in the same transaction, they may be charged or tried together or separately as the Court thinks fit." No useful purpose would be served by an elaborate examination of the judicial decisions in which the expression "same transaction" has been interpreted, although reference has been made at the Bar to many of the recent cases on the point: *Queen-Empress* v.

(1) (1901) I. L. R. 25 Mad. 61; L. R. 28 I. A. 257.

(2) (1901) I. L. R. 24 Mad. 523, 547.

Fakirapa (1), *Emperor* v. *Sherufalli* (2), *Emperor* v. *Jethalal* (3), *Emperor* v. *Datto Hanmant* (4), *Emperor* v. *Hari Raot* (5), *Emperor* v. *Ganesh Narayan*(6), *Nga Tha Gye* v. *Emperor* (7), *Ishar Das* v *Emperor* (8), *Emperor* v. *Ghulam* (9), *Pulin Behary Das* v. *Emperor*(10) and *Choragudi* v. *Emperor*(11). It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated: they are proximity of time, unity or proximity of place, continuity of action and community of purpose or design. To take one illustration: A and B conspire to cheat X; in pursuance of that conspiracy and in fulfilment of its object, A cheats X on a specific occasion. The position may clearly be maintained that the two different offences of conspiracy to cheat committed by A and B and the offence of cheating committed by A alone, have been committed in the same transaction. This view is in accord with that adopted in two recent decisions of this Court, from which we see no reason to dissent in this respect: *The Superintendent and Remembrancer of Legal Affairs, Bengal*, v. *Monmohan Ray*, (12) and *Harsha Nath Chatterjee and Others* v. *Emperor* (13). We hold accordingly that if A, B and C conspire to make or have in their possession or under their control an explosive substance within the meaning of the Explosive Substances Act, and if in

(1) (1890) I. L. R. 15 Bom. 491.
(2) (1902) I. L. R. 27 Bom. 135.
(3) (1905) I. L. R. 29 Bom. 449.
(4) (1905) I. L. R. 30 Bom. 49.
(5) (1906) 4 Cr. L. J. 420.
(6) (1912) 14 Bom. L. R. 972; 13 Cr. L. J. 833.
(7) (1912) 13 Cr. L. J. 485.
(8) (1908) 8 Cr. L. J. 75.
(9) (1908) 8 Cr. L. J. 191.
(10) (1912) 15 C. L. J. 517, 582.
(11) (1910) I. L. R. 33 Mad. 502.
(12) (1914) 21 C. L. J. 195.
(13) (1914) 21 C. L. J. 201.

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pursuance of such conspiracy, A makes or has in his possession or under his control an explosive substance they may, if the Court thinks fit, be charged and tried together under Section 120-B, Indian Penal Code, and Section 4 (*b*) of Act VI of 1908. The fourth ground must accordingly be overruled as unsustainable.

The fifth ground on which the legality of the trial is questioned is that persons who are alleged to be conspirators in the charge have not been prosecuted, although their names and adresses were known to the prosecution. Reference has in this connection been made to *Emperor* v. *Lalit Mohun* (1), where it was ruled by Jenkins, C.J., that in a conspiracy case the accused can be charged with conspiracy with persons unknown, but that if they are charged with conspiracy with persons known, then such persons must be named in the charge. It is not necessary for our present purpose to determine whether the rule so stated is not too widely formulated, but it may be observed that a different view has sometimes been maintained. Thus in *Stoddart* v. *R.* (2), the legality of a conviction for conspiracy was questioned on the ground that though the prosecution knew that one Klinge was an alleged conspirator, he was not named in the indictment. In support of this objection, reliance was placed on *Rex* v. *Walker* (3); *The Queen* v. *Thompson* (4), and *R.* v. *Robinson* (5); but it was overruled by the Court of Criminal Appeal. That judicial opinion on the point has not been quite uniform is obvious from an examination of the cases mentioned, as also *R.* v. *Deakin* (6), *R.* v. *Campbell* (7),

(1) (1911) I. L. R. 38 Calc. 559; 15 C. W. N. 98.
(2) (1909) 2 Cr. Ap. R. 217, 224, 237.
(3) (1812) 3 Camp. 264.
(4) (1851) 16 Q. B. 832.
(5) (1817) Holt 595.
(6) (1800) 2 Leach 862.
(7) (1843) 1 C. & K. 82.

R. v. *Stroud* (1), *R.* v. *Caspar* (2), *Rex* v. *Bush* (3), *R.* v. *Esdaile* (4), 1 Chitty on Criminal Law, 213; Russell on Crimes (1909), 186, 187, 1292, 1478. The question has also been the subject of elaborate discussion in the Courts of the United States. In *People* v. *Mather* (5), the charge of the indictment was of a conspiracy to abduct William Morgan who was supposed to have revealed the secrets of the Masonic fraternity. The indictment was of Mather alone, and the charge of the indictment was that Mather with "other persons unknown" had conspired, etc., although it was a fact that many of the other persons were well-known. The Court held, on the authority of *R.* v. *Herne* (6), mentioned in the case of *Rex* v. *Kinnersley and Moore* (7) and *Anon* (8), that the indictment against Mather alone was good; there was a conviction and a new trial was denied. Marcy J., observed: "in a charge of conspiracy, it seems no more necessary to specify the names of the defendant's co-adjutors than in an indictment for an assault and battery to name others besides the accused who were concerned in the trespass." The view thus taken in *People* v. *Mather* (5), was approved in *People* v. *Richards* (9) and *United States* v. *Miller* (10). Let us assume, however, that the strict rule formulated in *Emperor* v. *Lalit Mohan* (11), is well-founded on principle and is supported by balance of authorities: that rule is clearly of no assistance to the accused in

(1) (1842) 1 C. & K. 187; 2 Moody 270.
(2) (1839) 2 Moody 101; 9 C. & P. 289.
(3) (1818) Russ. & R. 372.
(4) (1858) 1 F. & F. 213; 2 East P. C. 651, 781.
(5) (1830) 4 Wendell N. Y. 229; 921 Am. Dec. 162.
(6) (1709) Unreported.
(7) (1719) 1 Strange 193.
(8) (1635) Cro. Car. 380.
(9) (1885) 67 Cal. 412; 56 Am. Rep. 722.
(10) (1878) 3 Hughes 553; 26 Fed. Cas. 1255.
(11) (1911) I. L. R. 38 Calc. 559; 15 C. W. N. 98.

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this case. That decision does not show that if all the known co-conspirators named in the charge are not placed on their trial, the trial of some without the others is vitiated. It is indeed open to the Court to place the co-conspirators on their trial separately: *Rex* v. *Kinnersley and Moore* (1), *The King* v. *Oxford* (2), *R.* v. *Nichols* (3), *R.* v. *Ahearne* (4), *People* v. *Richards* (5), *United States* v. *Miller* (6), Russell on Crimes (1909) 149, 180, 3 Chitty on Criminal Law, 1141, Bishop on New Criminal Procedure, Volume 1, section 464, 1022, Volume 11, section 225; McClain on Criminal Law, Volume II, section 981. This might in certain circumstances, be an obvious advantage to the persons actually placed on trial; they would be at liberty, if they so desired, to call the alleged co-conspirators as witnesses, a course which could not possibly be adopted, if all the co-conspirators were tried jointly. But it has been argued that if persons are allowed to be named as co-conspirators in the charge and are yet not placed on their trial, there may be an inducement to the prosecution to mention the names of persons as co-conspirators indiscriminately, with a view to let in evidence under Section 10 of the Indian Evidence Act, which would otherwise be inadmissible. This apprehension is, in our opinion, groundless, for whenever evidence is attempted to be made admissible under that section, the defence is entitled to insist on strict compliance with its provisions, namely, upon proof of reasonable ground for belief that the persons named have conspired together. We are unable to hold

(1) (1719) 1 Strange 193.
(2) (1811) 13 East 411.
(3) (1742) 13 East 412n.
(4) (1852) 2 Ir. C. L. 381; 6 Cox 6.
(5) (1885) 67 Cal. 412; 56 Am. Rep. 772.
(6) (1878) 3 Hughes 553.

accordingly that the omission of the prosecution to proceed against the alleged conspirators in this case has vitiated the trial of the other persons. The fifth ground, consequently, fails.

The sixth ground on which the legality of the trial has been assailed is that facts disclosed, if believed, indicate that the accused have committed an offence punishable under Section 121-A, Indian Penal Code, and should have been tried accordingly. The contention in substance is that the prosecution has been commenced under section 120-B, Indian Penal Code, and section 4 (*b*) of Act VI of 1908 with a view to evade the requirements of section 196 of the Criminal Procedure Code, compliance wherewith, as was ruled in *Barindra Kumar Ghosh* v. *Emperor* (1), is imperative in prosecutions for offences against the State. In our opinion, there is no basis for this contention. No doubt evidence has been adduced on behalf of the prosecution to show that revolutionary literature was in possession of some of the accused persons; no foundation, however, has been laid to establish that the accused had conspired to commit an offence punishable under section 121-A, Indian Penal Code. But even if it be assumed that the accused could have been successfully prosecuted under section 121-A, it does not follow that it was obligatory upon the Crown to prosecute them under that section. If the accused have committed an offence under section 4 (*b*) of the Explosive Substances Act 1908, in pursuance of a criminal conspiracy, it is open to the Crown to prosecute them for such offences irrespective of the question of the ultimate design of the alleged conspiracy. On the other hand, the accused might legitimately contend that the trial should proceed strictly on the lines of the charges

(1) (1909) I. L. R. 37 Calc. 467 ; 14 C. W. N. 1114.

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framed, and that evidence, such as would have been appropriate to support a charge under section 121-A, should not be admitted in the disguise of evidence in support of a prosecution under Section 120-B. The sixth ground must thus be overruled as untenable. We shall now proceed to examine the merits of the case.

The fundamental question on the merits, which has led to protracted discussion in this Court as in the Court below, relates to the true nature of Exhibits I, V, VI and VII. On behalf of the prosecution, the view has been maintained that these exhibits constitute materials for the preparation of bombs, while on behalf of the accused the theory has been vigorously supported that these articles were used by Sasanka in experiments towards the construction of a cheap acetylene generator. In support of their position, the prosecution have adduced in evidence specimens of bombs, exploded and unexploded, for instance the Dalhousie Square bomb, dated the 2nd March, 1911, the Midnapore bomb, dated the 13th December, 1912, the Delhi bomb, thrown at the Viceroy on the 23rd December, 1912, the Moulvi Bazar bomb, dated the 27th March, 1913, the Lahore bomb, dated the 17th May, 1913, the Mymensingh bomb, dated the 30th September, 1913, and the Bhadreshwar bomb, dated the 31st December, 1913. Of these, the bombs mentioned first and last did not explode and are practically intact, although the explosive substances contained therein have been removed; all the other bombs exploded and caused destruction of life. The bombs which have been exhibited are obviously all of the same type, and there is expert testimony to this effect. Colonel Muspratt Williams says that the design of these bombs is the work of one controlling mind not that they had necessarily been made by one man. He

adds that he had never met with a bomb of a similar construction before his examination of the series of bombs exhibited in this case. Major Turner says that the series of bombs from Dalhousie Square to Bhadreshwar all belong to the same family and that he had never before come across this kind of bomb. The system adopted appears to have been to use, for the shell of the bomb, a tin of the kind in which tobacco cigarettes or condensed milk is sold, and with it to use iron discs and iron clamps. Exhibit I is made up of a similar tin, similar discs and similar clamps. Exhibits V and VI taken together make up another complete shell of a bomb, which consists of a tin case with three discs and four clamps. The total find aggregates to 2 tins, 11 discs, 8 completed clamps and several others in various stages of preparation. The similarity of these articles to the tins, discs, and clamps actually used in the bombs exhibited is remarkable and is calculated to strike the intelligent observer, without the aid of expert testimony. Two points of difference, however, have been emphasised on behalf of the defence. It has been argued, in the first place, that whereas the discs found in the room of Sasanka were made of ordinary iron, the discs used in the bombs exhibited were, in some instances at least, made of galvanised iron. With reference to this circumstance, it has been contended that discs so made could not be used for the purpose of a bomb, as an explosion would take place as soon as the discs came into contact with picric acid. The obvious answer is that, as in the case of the bombs exhibited, these discs, before they could be used in an actual bomb, would have to be lacquered, and lacquer was in fact found in the room. It may also be pointed out that the inner surface of the tin case itself should for safety be protected in the same way as the discs, to

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avoid the formation of picrate of tin which, according to Colonel Muspratt-Williams, is a highly sensitive substance. In the second place, it has been argued that as there is a slight difference in the thickness of the iron used for the discs and clamps found in the room and those used in some of the actual bombs exhibited, the articles suspected could not have been intended for use in the construction of a bomb. There is no force in this contention, for as Major Turner says in spite of the fact that some of the parts are lighter, the principle remains the same. After careful examination of the tin cases, discs and clamps found in the room and a comparison therewith of the corresponding parts of actual bombs, we have arrived at the same conclusion as the Sessions Judge, namely, that these articles found in possession of Sasanka were suitable for use as bomb shells. This leads us to the question whether they could have been intended for innocent use. This enquiry is essential, because it is an elementary rule that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. As Anderson B. says in *R.* v. *Hodge* (1), to enable the Jury to bring in a verdict of guilty, it is necessary not only that it should be a rational conviction, but that it should be the only rational conviction which the circumstances would enable them to draw. What then, is the reasonable hypothesis which has been offered as an explanation of the articles found in possession of Sasanka? The theory he puts forward for acceptance is that at the suggestion of one Jogendra Nath Dutt, he was engaged in experiments for the manufacture of a simple and cheap acetylene gas lamp which could be used as a

(1) (1838) 2 Lewin C. C. 227.

substitute for the native *kupies*, and that Exhibit I was only a part of the generator made by him under instruction for Jogendra Nath Dutta, to whom were due the details of the lamp, namely, the tin, discs, clamps and general construction. This theory, however, is not consistent with the admitted facts of the case. In the first place, if Sasanka was still engaged in experiments for the construction of a cheap lamp, how is it that he was in possession of so many completed discs and clamps? In the second place for the purpose of an experiment in the construction of a lamp, it would be essential to have holes on the sides of the shells, into which a tube could be inserted for the passage of the gas generated. But no tube, no burner, no carbide, nothing except a solitary cock, was found in the room; nor was there any hole on the side of either of the two tin cases in which a tube could have been inserted. In the third place, for the purposes of a lamp, even at the experimental stage, a disc with a pinhole through which water could pass slowly from one of the chambers to the other, where the carbide would be kept, would be essential, but none such was found. On the other hand, several discs were found with large perforations, precisely as in the case of discs used in actual bombs. In the fourth place, this theory of an acetylene generator was not suggested till a very late stage of the trial. Mr. Lowman, who was present at the search, asked Sasanka what Exhibit I was, as soon as it came into his hands. The only answer which Sasanka gave was "look and see for yourself." Sasanka was subsequently asked the same question by Mr. Tegart and Mr. Denham, but he declined to give any explanation as to the articles found. More than this, there was not the remotest suggestion that he was engaged in experiments on the construction of an acetylene generator,

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during the entire period that the trial lasted in the Court of first instance from the 19th December 1913 to the 21st February 1914. In the fifth place, if Sasanka, as he stated before the Sessions Judge, was still engaged in experiments at the time of his arrest, how was a model lamp, such as he had in contemplation, prepared and got ready for use under his instructions while he was under arrest? The generator theory was first put to Colonel Muspratt Williams in course of cross-examinations on the 6th April 1914. Mr. Craig of the Linde Ice Factory, under whom Sasanka had worked in the Oxyacetylene Department, was examined on the 24th April 1914, and the generator theory was again put to him in cross-examination. But these experts pronounced the idea to be impracticable. It now transpires from the evidence that, in the interval, on or about the 16th April 1914, a model lamp had been prepared by a tin smith under instructions from Sasanka conveyed through his pleader. With the article so constructed, Sasanka gave an exhibition in Court on the 14th May, 1914, and demonstrated that the gas generated by contact of the water with the carbide, when carried through a tube affixed to the side of the tin shell and ignited with a match, gave a tolerably bright light. The exhibition was repeated in this Court by Counsel for the accused. It is not necessary to discuss whether what was exhibited as a lamp was capable of practical use of such; the answer would depend upon various factors which have not been investigated, for instance, the total cost of construction of the article, the price of the carbide consumed, the time during which the light would burn, the strength of the generator to keep the gas intact, and other like matters. Let us assume, however, that the article exhibited was fit for use as a lamp and negatives the

confident opinion to the contrary given by expert witnesses. The question inevitably arises, when did Sasanka complete his investigation, as, according to his own statement, he was still in the experimental stage when he was arrested and the articles were seized. The truth is that the theory of a generator is an ingenious after-thought of a well skilled mechanic employed in the Oxyacetylene Department of the Linde Ice Factory. In the sixth place, if Sasanka was engaged in experiments upon the construction of a cheap generator, one might, not unnaturally, have expected to find in his library books and papers on acetylene and on generators; on the other hand, what was found in his possession was seditious literature which advocated the use of bombs for the attainment of revolutionary ideals. Upon a review, then, of all the circumstances of the case, the conclusion appears irresistible that Exhibit I and the other exhibits similar to its component parts, were intended for use, not as acetylene generators, but as bomb-shells. The fact that they were kept in the room, apparently without any attempt at secrecy, is explained by the circumstance that they were not calculated to attract the attention, much less to excite the suspicion, of persons not familiar with the mechanism of this particular type of bombs and their construction. We are not unmindful that, as has been strenuously argued by Counsel for the defence, in criminal cases there can be no conviction unless guilt is established with very great clearness. This presumption of innocence signifies no more than this, that if the commission of a crime is directly in issue in any proceeding, it must be proved beyond reasonable doubt; in other words, as Thayer points out (Evidence at the Common Law, page 558), the "whole doctrine when drawn out is, *first*, that a person who is charged with

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a crime must be *proved* guilty, that according to the ordinary rule of procedure and of legal reasoning, *presumitur pro reo, i.e., Neganti*, so that the accused stands innocent until he is proved guilty; and, *second*, that this proof of guilt must displace all reasonable doubt." When we test the case in the light of these principles, we feel no doubt that the exhibits in question were intended for use in the construction of bomb-shells.

The next important question of fact which requires determination is whether the prosecution has proved the existence of a conspiracy to make explosive substances or to possess them or to have them under control, with intent by means thereof to endanger life or to cause serious injury to property in British India. The question may be appropriately considered at this stage, because it is well settled that in a charge of conspiracy, general evidence of the existence of the conspiracy may first be given before particular facts are proved to show that one or more of the defendants took part in it: *R.* v. *Sidney* (1), *Queen Caroline's Case* (2), *The King* v. *Hunt* (3), *Regina* v. *Frost* (4), *Regina* v. *Shellard* (5), *Reg.* v. *Desmond* (6), *Reg* v. *Deasy* (7). It is now admitted that Sasanka manufactured and was in possession of the articles which, in concurrence with the Sessions Judge we have found, were intended for use in the manufacture of bombs. The question is whether Sasanka had confederates or associates in the design and its accomplishment. An answer in the affirmative is the only solution admissible in view of incontestable facts. The circumstance that bombs of this particular type

(1) (1683) 9 St. Tr. 817, 841.
(2) (1820) 2 B. & B. 284, 302, 310; 1 St. Tr. N. S. 1348.
(3) (1820) 3 B. & Ald. 566.
(4) (1839) 9 C. & P. 129.
(5) (1840) 9 C. & P. 277.
(6) (1868) 11 Cox 146.
(7) (1883) 15 Cox 334.

have been used in various places in British India as widely separated from each other, as Calcutta, Lahore, Delhi, Sylhet, Mymensingh and Midnapore, points to the conclusion that more than one person is engaged in these transactions; the bombs are not the handiwork of one individual, though they may be the work of one controlling mind. This inference is confirmed by the contents of at least one revolutionary document found in the room of Sasanka, which advocates the realization of the independence of India with the aid of heroic patriots by bloodshed and assassination. This aspect of the case does not, in our opinion, stand in need of elaboration, and the only substantial question for consideration with regard to each of the accused persons, is the extent, if any, to which his complicity in the conspiracy charged and proved has been established beyond reasonable doubt. Before we deal, however, with the cases of the individnal accused persons, it is necessary to decide an important question of admissibility of evidence, which turns upon the true construction of the terms of Sections 14 and 15 of the Indian Evidence Act.

At the trial before the Sessions Judge evidence was adduced by the prosecution to establish that some of the accused had associated with Pulin Behary Das in 1908 or 1910 and that they had been seen from time to time in the premises of the Dacca Anusilan Samity, whereof Pulin Behary Das was the leader. Exception was taken on behalf of the defence, to the admissibility of this evidence, but the objection was overruled. The objection has been reiterated in this Court, and we have been invited to pronounce a decision on the point. Evidence has been adduced to prove that Pulin Behary Das and some of his associates were convicted in 1912 of offences under Section 121-A of the Indian Penal Code, but no evidence has been

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given as to the nature of the activities of the Samiti, of the different grades of its members and of the extent of their participation in the ultimate aims and purposes of the society; proof in these respects, could, indeed, be hardly attempted without reproduction of the voluminous evidence adduced at the trial of the Dacca Conspiracy Case. The defence, however, have elicited in cross-examination of the prosecution witnesses that the activities of the Anusilan Samity were not known to have been in any way connected with bombs. In these circumstances, we have to decide whether evidence was admissible to prove that some of the present accused had in 1908 or 1910 associated with Pulin Behary Das and had been seen engaged in *lathi* play or in other innocent pursuits on the Samiti premises. In our opinion, the evidence was inadmissible and should have been excluded. The prosecution has relied upon Section 14 of the Indian Evidence Act which is in these terms: "Facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good will towards any particular person or showing the existence of any state of body, or bodily feeling are relevant, when the existence of any such state of mind or body or bodily feeling—is in issue or relevant." But on behalf of the prosecution, the first explanation to the section which is absolutely fatal to their argument, has been completely overlooked. "A fact relevant as showing the existence of a relevant state of mind must show that *the state of mind exists, not generally, but in reference to the particular matter in question.*" We invited counsel for the prosecution to explain how evidence of association with Pulin Behary Das in 1908 or presence in his Samity, could have any relevancy with reference to the particular matter in question before us, namely,

the intention with which the first four accused had assembled in the room rented by Sasanka, on the night of the 20th November 1913; but not even a plausible answer was attempted. Illustrations (i), (j), (o) and (p) also plainly indicate that the contention of the prosecution is not well founded. Nor can the prosecution derive any assistance from Section 15 of the Indian Evidence Act, which is in these terms: "Where there is a question, whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of *similar* occurrences, in each of which the person doing the act was concerned, is relevant." Reference, however, was made to a number of judicial decisions which throw light upon the question in controversy, and particularly to *Attorney General* v. *Makin* (1), *Blake* v. *Albion Life Assurance Society* (2), *The Queen* v. *Rhodes* (3), *R.* v. *Wyatt* (4), *The King* v. *Bond* (5), *The King* v. *Fisher* (6), *The King* v. *Ellis* (7), *The King* v. *Ball* (8), *The King* v. *Rodley* (9), *R.* v. *Shellaker* (10), *R.* v. *Hunt* (11), *R.* v. *Geering* (12), *R.* v. *Garner* (13), *R.* v. *Cotton* (14), *Reg.* v. *Jones* (15), and *The Queen* v. *Ollis* (16). No useful purpose would be served by an analysis of the special facts of each of these cases, but the principles deducible therefrom as to the law administered in England, may be briefly formulated. Facts similar to but not

(1) [1894] A. C. 57; (1893) 17 Cox 704.
(2) (1878) 4 C. P. D. 94.
(3) [1898] 1 Q. B. 77.
(4) [1904] 1 K. B. 188.
(5) [1906] 2 K. B. 389.
(6) [1910] 1 K. B. 149.
(7) [1910] 2 K. B. 746.
(8) [1911] A. C. 47.
(9) [1913] 3 K. B. 468.
(10) [1914] 1 K. B. 414.
(11) (1820) 3 B. & Ald. 566; 22 R. R. 485; 1 St. Tr. N. S. 171.
(12) (1849) 18 L. J. M. C. 215.
(13) (1864) 3 F. & F. 681.
(14) (1873) 12 Cox 400.
(15) (1877) 14 Cox 3.
(16) [1900] 2 Q. B. 758.

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part of the same transaction as the main fact, are not, in general, admissible to prove either the occurrence of the main fact or the identity of its author. But evidence of similar facts although in general inadmissible to prove the main fact or the connection of the parties therewith, is receivable, after evidence *aliunde* on these points has been given, to show the state of mind of the parties with regard to such fact; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto. In general, whenever it is necessary to rebut, even by anticipation the defence of accident, mistake, or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given. To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question and not of a different character, and the acts tendered must also have been proximate in point of time to that in question. It is plain that the principles thus formulated are of no assistance to the prosecution. The view we take is consistent with the decisions in *Empress* v. *Vyapoory* (1), *Mankura* v. *Queen-Empress* (2), *Baharuddin* v. *Emperor* (3), *Giridhari Lal* v. *Emperor* (4), and *Emperor* v. *Debendra Prosad* (5). With reference to the case last mentioned, it may be noted that the Court properly declined to follow *Reg.* v. *Holt* (6) which is no longer authority: *Rex.* v. *Smith* (7). We hold, accordingly, that the evidence of association

(1) (1881) I. L. R. 6 Calc. 655; 8 C. L. R. 197.
(2) (1899) I. L. R. 27 Calc. 139.
(3) (1913) 18 C. L. J. 578.
(4) (1909) 11 Cr. L. J. 428, 430.
(5) (1909) I. L. R. 36 Calc. 573; 9 C. L. J. 610.
(6) (1860) Bell 280; 8 Cox 411.
(7) (1905) 20 Cox. 804; 92 L. T. 208.

with Pulin Behary Das and the Anusilan Samity are irrelevant, for the purposes of proof of the conspiracy charge in this case, and should not have been admitted.

In the consideration of the individual cases, Sasanka, who has been the central figure in this trial, naturally arrests our attention first. We have already held that he made and was in possession of articles intended for use in the construction of bombs. These articles are manifestly "explosive substances" within the meaning of that expression as defined in section 2 of the Explosive Substances Act, 1908. For the purposes of the Act the expression "explosive substance" is deemed to include any materials for making any explosive substance, also any apparatus, machine, implement or material used or adapted for causing any explosion in or with any explosive substance, also, any part of any such apparatus, machine or implement. This comprehensive definition obviously covers the articles made by Sasanka and found in his possession. The point for consideration is, whether all the elements essential to sustain a conviction have been established. Here, three points require examination, namely, *first*, were these articles made and possessed by the accused "unlawfully and maliciously"; *secondly*, can it be said that the accused intended, "by means thereof," to endanger life or cause serious injury to property, when it is plain that, in the absence of explosives, the articles are harmless; and, *thirdly*, is it proved that the articles were intended for use in "British India" with a view to endanger life or injure property. It is worthy of note that section 4 of Act VI of 1908, which we are called upon to interpret, substantially reproducts the provisions of section 3 of 46 and 47 Vict., Chapter 3 (Explosive Substances Act, 1883).

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In the solution of the first question, we may, consequently, interpret the expression "unlawfully and maliciously" in the sense in which it is familiarly used in the Criminal Law of England. The term "unlawfully," as is plainly indicated by section 5 of Act VI of 1908, which reproduces the provisions of section 4 of 46 and 47 Vict., Chapter 3, signifies, "not for a lawful object." The term "maliciously" signifies "intentionally and without justification or excuse or claim of right": *The Queen* v. *Clemens* (1), *Miles* v. *Hutchings* (2). Blackburn, J. observed in *Reg.* v. *Ward* (3), that a man acts maliciously when he wilfully does that which he knows will injure another in person or property. This accords with the statement of Littledale J. in *M'cPherson* v. *Daniels* (4); "malice, in its legal sense, denotes a wrongful act, done intentionally, without just cause or excuse," which is identical with the language used by Bayley, J. in the earlier case of *Bromage* v. *Prosser* (5). The *dictum* of Bayley, J. was quoted with approval by Brett, L. J. in *Clark* v. *Molyneux* (6) and by Halsbury, L. C and Lord Watson and Lord Herschell in *Allen* v. *Flood* (7); the *dictum* of Littledale, J. was, on the other hand, adopted by Martin B in *Johnson* v. *Emerson* (8). Blackburn, J. had the matter again under consideration in *R.* v. *Pembliton* (9) in which he observed that where any person wilfully does an act injurious to another, without lawful excuse, he does it mali ciously." To the same effect is the language used by

(1) [1898] 1 Q. B. 556; 19 Cox. 18.
(2) [1903] 2 K. B. 714; 20 Cox. 555.
(3) (1872) 12 Cox. 123; 1 C. C. R. 356, 360.
(4) (1829) 10 B. & C. 263.
(5) (1825) 4 B. & C. 247.
(6) (1877) 3 Q. B. D. 237.
(7) [1898] A. C. 1.
(8) (1871) L. R. 6 Ex. Ch. 329, 373.
(9) (1874) 2 C. C. R. 119, 122; 72 Cox. 607.

Bowen, L. J. in *Mogul Steamship Co., Ld.* v. *McGregor* (1), "maliciously means and implies an intention to do an act which is wrongful, to the detriment of another; the term wrongful, imports, in its turn, the infringement of some right." Reference may also be made, in this connection, to the definition of the term "maliciously" given in the laws of England, Ed. Halsbury, Volume IX, page 768, Article 1499 as also to the observations of Lord Coleridge, C. J. in *Reg.* v. *Martin* (2), of Lord Lindley in *South Wales Miners' Federation* v. *Glamorgan Coal Co., Ld.* (3) and of Collins M. R. in *Read* v. *Friendly Society* (4). There can be no question, in the case before us, that the bomb, on the construction whereof Sasanka was engaged was not intended for a lawful object and there can be no controversy also that his act was intentional.

In the solution of the second question, namely, the precise import of the expression "by means thereof" we are assisted by a decision in *Reg.* v. *Charles* (5), which turned upon the construction of sections 3, 4 and 9 of 46 and 47 Vict., Chapter 3. It is plain that the "explosive substance" mentioned in Section 4 (*b*) of Act VI of 1908 need not be such as to enable a person *by means thereof alone*, without the aid of other substances, to cause danger to life or injury to property. If this view were not adopted, the comprehensive definition contained in Section 2 would be nugatory. The term "explosive substance" as used in Section 4 (*b*) includes *any part* of any apparatus, machine, or implement intended to be used or adapted for causing or aiding in causing any explosive substance. The definition is of wide generality, and in the

(1) [1892] A. C. 25; 23 Q. B. D. 598.
(2) (1881) 8 Q. B. D. 54; 14 Cox 633.
(3) [1905] A. C. 239, 255.
(4) [1902] 2 K. B. 732.
(5) (1892) 17 Cox 499.

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case of *R.* v. *Charles* (1), it was ruled that any part of a vessel, which, when filled with an explosive substance is adapted for causing an explosion, is itself an explosive substance within the statute. The articles found with the prisoners in that case were a lead bolt, a fuse, a brass bolt, a screw, a brass casting, and evidence was given to show that these were various parts of a vessel, which, when filled with chlorate of potash or other explosive substance formed a bomb of a highly dangerous character. The articles found in the present case, must, consequently, be deemed "explosive substances" within the meaning of the statute.

In the solution of the third point, we have to bear in mind that the evidence on the record furnishes no indications that the activities of the members of the conspiracy extend beyond the limits of British India; all the bombs produced at the trial have been found in different parts of British India. The articles themselves were found in a house in the suburbs of Calcutta. From the circumstances, the inference of fact may legitimately be drawn that the "explosive substances" made and possessed by Sasanka, were intended for use in British India. We must hold accordingly that all the elements necessary to sustain a conviction under Section 4 (*b*) of the Explosive Substances Act, 1908, have been established in the case of Sasanka. The elements essential for a conviction under Section 120-B, Indian Penal Code, have also been made out. Consequently, his conviction under both the charges must be upheld.

We have next to consider the individual cases of the group of three persons found in the room of Sasanka on the morning of the 21st November, 1913.

(1) (1892) 17 Cox 499.

namely, Chandra Sekhar, Saroda and Dinesh; we shall discuss them in the order just named.

Chandra Sekhar appears to have made the acquaintance of Sasanka in Dacca for the first time in the year 1908, but there is no evidence to show that any communications had passed between them during the five or six years which had elapsed since then. He is proved to have been employed for some time past in the Kohinoor Printing Press at Chittagong owned by his brother and the record of his attendance there shows that there he had not left Chittagong for at least two years prior to his arrest in Calcutta. On the 15th November, 1913, he left Chittagong for Calcutta on business connected, it is alleged with the press. He arrived at Calcutta on the evening of the 16th November, and is shown to have spent the night in the house of Babu Kshitish Chandra Sen, vakil of this Court, who comes from Chittagong. Next day he went to the place of his cousin Saroda Charan Dey, with whom he remained until the evening of the 20th November; he left that evening at about 8 or 8-30, saying that he was to visit a friend who had invited him. In the interval he is proved to have paid a visit to the firm of Messrs. S. K. Lahiri & Co., in connection with the printing of question papers for the Chittagong Municipal School. He asserts that one of the objects of his visit to Calcutta was to expedite the printing and despatch of these question papers. His second object, he alleges, was to visit the firm of Messrs. Erasmus Jones & Co. for the purpose of fancy cards and coloured papers for his press. It is not shown, however, that he visited the latter firm, and it is doubtful whether he went to their premises; at any rate, it is proved that he did not meet the proprietor of the firm or the head clerk. In the early hours of the morning of the 21st November, 1913,

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when the door was opened by Sasanka in response to the demands of the Police, Chandra Sekhar was one of the three persons found asleep in the room. To account for his presence in the room, he alleges that on the 18th or 19th November, he had met Sasanka (whom he knew by his real name Amrita Lal) at the Ram Krishna Book Depôt, where he himself had gone to purchase some books. Sasanka invited him to his place one evening for a chat, so he went there on the evening of the 20th November, and as it grew late, he was asked to spend the night there. He stayed, and early in the morning he was arrested by the Police. There is nothing inherently improbable in this story. On the other hand, any possible theory that he had come down to Calcutta from Chittagong at the invitation of Sasanka for the purposes of a criminal conspiracy, is negatived by two significant facts. In the first place, when arrested, the return half of a railway ticket was found in his possession; this was produced by the prosecution after considerable effort on the part of the defence and was even then not made an exhibit. The defence has suggested that, in this respect, the prosecution was designedly obstructive. The precise attitude of the prosecution in this matter cannot be very clearly made out from the record. But we desire to emphasise the view expressed by Jenkins, C.J., in *Ram Ranjan Roy* v. *Emperor* (1), in conformity with the ruling in *Regina* v. *Holden* (2), that it is the duty of the prosecution not so much to secure a conviction as to place all the evidence in the case fairly and fully before the tribunal by which alone the guilt or innocence of the accused is to be determined. This return ticket shows that Chandra Sekhar, when he left Goalundo on his

(1) (1914) I. L. R. 42 Calc. 422; (2) (1838) 8 C. & P. 606, 609.
19 C. W. N. 28.

way from Chittagong to Calcutta, intended to return within 6 days. In the second place he had started from Chittagong with the very small sum of Rs. 10: out of this, he left one half with Babu Kshitish Chandra Sen in Calcutta. It could hardly have been his intention, with this small sum at his disposal, to prolong his stay in Calcutta or to engage in a conspiracy for the manufacture of explosives. In fact, the only circumstance against him is his presence in the room of Sasanka on the morning of the arrest; of this, as we have stated, he has offered a not improbable explanation. The Sessions Judge was, as appears from his judgment, considerably influenced in his opinion against this accused by the evidence of his association with Pulin Behary Das and the Anusilan Samity in 1908. That evidence, as we have already held, was inadmissible and should not have been admitted. We further observe that the Sessions Judge mentions that this accused had, on the 20th November, 1908, taken out a seditious book *Mookti kone pathay* from the Samity Library. This evidence is not quite trustworthy, and had it not been inadmissible would have been entirely valueless; more than this, the book mentioned has not been exhibited and no proof whatever has been adduced as to the character of its contents. In our opinion, the evidence on the record is not sufficient to sustain the conspiracy charge against the accused Chandra Sekhar.

Saroda Charan Guha, the second of the three persons arrested in the room of Sasanka, comes of a family of some means and respectability, resident at Mulgaon in the district of Faridpur. Saroda is the third of the four sons of his father. His second brother Tara Charan is demented and is confined in a Lunatic Asylum. His youngest brother Debendra had, notwithstanding the protest of his father, taken

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in marriage a girl of an inferior caste and had on this account been disinherited. Saroda himself had, as is amply proved by the evidence on the record, incurred the displeasure of his father and of other members of his family by reason of what they considered to be excessive devotion to his wife. The correspondence between the members of the family, which has been produced, shows that his conduct at the time of the annual Puja festival had excited unmistakable bitterness of feeling; he was charged not only with the neglect of his father during his illness but also with misappropriation of family funds; the imputation of misconduct in this respect as appears from the evidence, was, however a much exaggerated one, if not wholly unfounded. In these circumstances, he is shown to have left Faridpur on the 16th November and reached Calcutta on or about the morning of the 17th November. He states that although he had relations in Calcutta, he did not on his arrival put up with them, but preferred to go to an acquaintance who lived at 88, Upper Circular Road. The next day he happened to meet Sasanka who lived in the same street. Some evidence was adduced to show that he had known Sasanka in 1908; he had at that time a shop at Gosainhat near Mulgaon in Faridpur. Sasanka was then in the employ of the Bazitpur Zemindars and had often to come to the Settlement Camp at Gosainhat Bazar. This is said to be how Saroda and Sasanka first became acquainted with each other. There is no evidence, however, to show that any communication had passed between the two since Sasanka left the place about the year 1910. Not only is there no trace of any correspondence between them, but the evidence makes it clear that Saroda had not been for at least ten years in Calcutta, where Sasanka was continuously employed since 1910. In

these circumstances, after the lapse of several years, Sasanka and Saroda met again on or about the 18th November, 1913. Saroda says that he mentioned to Sasanka how he had quarrelled with his family and left them; he also told him that he had not much money with him and had, on arrival in Calcutta, been taken ill with fever. Sasanka offered to put him up in his own room till he got well, and this, according to Saroda, explains his presence in that room at the time of the search on the morning of the 21st November. There has been much animated discussion in this Court on the question, whether Saroda was in fact ill at the time. His jail history ticket shows that after his arrest on the 21st November, he was, on the 25th November, placed in hospital; his temperature was high, and according to Dr. Mulvany, who wrote to the Magistrate on the 26th November, Saroda apparently had fever for some days and was very weak then. Dr. Makhan Lal Mandal, who attended on him in jail, states that Saroda was at the time suffering from fever, possibly from about a week before. This fits in precisely with the evidence that Dr. Sen Gupta had seen Saroda and had prescribed medicine for him for fever on the 17th November. These facts render it extremely probable that Saroda was ill on or about the 17th November and that his illness continued up to the time he was taken to the jail hospital on the 25th November, though there is no direct evidence to show the precise extent of his illness at the time of his arrest. The events so far narrated do not indicate any criminal act on the part of Saroda or tend to connect him with a criminal conspiracy. But, at the search, five letters were found, written by him on Sunday the 16th November, 1913, though not posted at the time of his arrest. One of these is addressed to his brother Debendra who had

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misconducted himself and had been disinherited, and another is addressed to his uncle Bepin. Two letters are addressed to two elder sisters of his wife, Sarojini and Hemangini, another letter is addressed to his wife Charuhasini. Much controversy has centred round these letters, and it has been vigorously urged by the prosecution that they have a very sinister significance. In these letters, Saroda announced to his various relations that he had made up his mind to apply himself to the practice of *yoga* and that he would accordingly remain incognito for a time; he also pressed them to induce his father to alter his testament and to disinherit him. He further stated that he would probably return in six months or a year and referred to the many difficulties in the way of practice of *yoga*. He exhibited great anxiety for the welfare of his wife and child in the interval. In one passage he said, "let me see how *mayer lila* (the inscrutable ways of the Mother) ends." It has been suggested on behalf of the prosecution that Saroda was about to embark on a very dangerous enterprise and that he was in fact the person selected by anarchist conspirators to throw the next bomb. This is nothing more than a suggestion; no evidence has been directed to establish this view, and we are unable to hold that the letters are sufficient to support the theory propounded. The language used in the letters is, no doubt, in some places, peculiar, but on the whole they appear to us to be not very unlike letters such as might be written by a man who had quarrelled with his family and who realised fully, as he himself says, in one of these letters, that he had to give up all hopes of paternal property unless he could act in obedience to the orders of his elders. Much stress has also been laid by the prosecution on the use of the expression *mayer lila*. That expression has in itself

no evil significance and is frequently used by a person in distress who finds all effort unavailing and realises how inscrutable are the ways of Providence. At the same time, there can be no question that, by a grievous and perverse misapplication of language,—an act of sacrilege which merits the strongest condemnation of all right-minded people—revolutionaries have applied the expression to describe anarchical outrages as if they were deeds sanctioned by the great Mother of the universe. We have carefully considered the letters of Saroda, and with the knowlege we possess of the circumstances which very probably inspired them, we are unable to say that the expression *mayer lila* used therein has any sinister import. Reference has also been made to the difficulties mentioned in the practice of *yoga* and to the dangers involved therein. This does not, in our opinion, necessarily indicate any criminal purpose in view, for the practice of *yoga* by persons not fully qualified for such work has sometimes been attended with danger. There has been also much discussion as to the purpose Saroda had in view, when he wrote these letters; it is possible that he never seriously intended to practise *yoga* and that his only object was to write a series of what looked like farewell letters to all his relations, so as to excite their sympathy and make them intercede with his father with a view to bring about a reconciliation between the old man and his undutiful son. There has also been some discussion as to why the letters were never posted; it may be that Saroda changed his mind; it is also not improbable that as he was taken ill on his arrival in Calcutta, he could not post the letters. We may add that a desperate effort was made by the prosecution to interpret the term *yoga* in these letters in the light of a paper on *yoga* philosophy found in

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the room of Sasanka. No connection whatever has been established between the two. But even if Saroda was shown to have been aware of the contents of the *yoga* pamphlet, it would not in any way alter his position. The laborious attempt made by Counsel for the prosecution to interpret the *yoga* pamphlet in a sinister sense was not attended with success. An abstract philosophical disquisition on *yoga* cannot rightly be cut up into isolated sentences and edited so as to furnish a possible text for revolutionary spirits, without positive proof that it was so used. At the same time, one cannot overlook the lamentable fact that the revolutionary literature brought to light in this instance and in other cases previously reported does suggest that such principles as the religious principle of absolute surrender to the Divine Will, a doctrine common to many religions, are employed by designing and unscrupulous men as a potent means to influence and unbalance weak-minded persons and thus ultimately bend them to become instruments in the commission of nefarious crimes from which they might otherwise recoil with horror. After a minute scrutiny, however, of the letters found in possession of Saroda, we are of opinion that, taken as a whole, they do not admit of the interpretation suggested by the prosecution and do not connect him with the conspiracy charged. Reference has also been made to the circumstance that Saroda undoubtedly gave a false name and incorrect addresses to the police, but he has offered a not unreasonable explanation of his conduct. He had been treated by the police for a long time as a political suspect, and his movements had been constantly watched, a position which even Mr. Tegart admits is not very pleasant. Such attentions on the part of the police are very irksome and Saroda may well have tried to evade observations.

Besides, some foundation has been laid in the evidence to support the allegation of Saroda that he found himself in this unfortunate position, because of a quarrel with an influential Panchayet, Akhoy Kumar Guha, who gave information to the Police and had him placed under surveillance. It also transpires from draft petitions found in his possession at the time of his arrest, that he was about to move the police authorities to have his name removed from the list of political suspects, and to invite an enquiry into the mode of life he led. No weight can also be attached to the fact that when he left Faridpur, he mentioned to a pleader's clerk an untrue reason for his visit to Calcutta; this may well be explained by a not unnatural reluctance to disclose to every person his family quarrels. On the whole, then there is really no substantial evidence to connect Saroda with the conspiracy. But, as appears from the judgment of the Sessions Judge, he was to some extent influenced in his opinion against Saroda by evidence of his association with Pulin Behari Das and the Anusilan Samity many years ago. This evidence, as we have held, is inadmissible; but it is also really of the vaguest description and, even if admitted, does not throw any light on the case. Our conclusion is that the conspiracy charge against Saroda has not been established.

Dinesh Chandra Das Gupta forms the third member of the group of persons arrested in the room of Sasanka on the morning of the 21st November, 1913. His antecedent history has been determined with considerable approach to precision. During the years 1910-12 Dinesh was a student in the Dacca College. On account of ill-health, his attendance at lectures fell short of the required minimum, and he left the college towards the close of the Session, 1911-12.

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He appears to have lived with his parents at Faridpur during the next twelve months. In July, 1913, he took his admission into the Krishnanath College at Berhampore, where he stayed till the 21st August, 1913. He then took a transfer certificate, came down to Calcutta, and, failing to obtain admission elsewhere, joined the Ripon College. He could not secure a seat in a licensed mess or hostel; he stayed accordingly first with a friend in College Street and then in 86-2, Mechua Bazar Street, apparently an unlicensed mess where students resided, from whence he intended ultimately to remove to the place of his brother-in-law at 74, Sookea Street. While resident at the Mechua Bazar Street mess, he became acquainted with one Jogesh Chandra Roy, who lived there and who, at the instance of the prosecution, has been named as a co-conspirator in the charge in this case; but Jogesh Chandra Roy has not only not been placed on his trial, but no evidence even has been adduced to prove his participation in the conspiracy. In September 1913, while still resident at the Mechua Bazar Street mess Dinesh joined in the relief works undertaken to alleviate the distress of persons affected by the Damodar floods. It was here at Burdwan that he first became acquainted with Sasanka through Jogesh Chandra Roy. He got an attack of malaria in Burdwan, returned to Calcutta and went to his parents at Faridpur in the first week of October. He had a fresh attack of malaria there and could not return to Calcutta till the 12th November 1913, some time after his College had re-opened. Next day, he attempted to remove from the Mechua Bazar Street mess to the place of his brother-in-law, but was informed that no room was available there. Consequently, he continued to live in the Mechua Bazar Street mess. He asserts that, on the 20th November, Sasanka came into the

mess and asked for his help, as Sasanka had a sick friend (Sarada Charan Guha) in his own room who required to be nursed. Dinesh acceded to this request, accompanied Sasanka, stayed in his room during the night, and was arrested early in the morning by the Police. There is nothing intrinsically improbable on the face of this account. The only person, who could speak to the alleged incident of Sasanka's visit to the Mechua Bazar Street mess on the 20th November, was Jogesh Chandra Roy ; the prosecution alleged him to be a co-conspirator but did not prosecute him. When the defence took out summons to cite him as a witness on their behalf, he was reported to have died. We are thus left with the undoubted fact that Dinesh was found in the room and his explanation as to how he was brought there. We have, in the next place, evidence adduced to show that Dinesh and Sasanka knew each other, and that Dinesh possibly now and then visited Sasanka. But nothing really turns on this evidence, because admittedly Dinesh came to know Sasanka in September 1913, on the occasion of the Damodar relief works, yet it is worthy of note that no previous connection whatever between the two has been traced or suggested. Considerable stress, however, has been laid by the prosecution upon a list of names in cipher, found in the breast pocket of a coat claimed by Dinesh as his during the search of the room of Sasanka. The handwriting of this document has not been identified. The cipher list was not put to Jatindra Chandra Majumdar, who had been called to prove the handwriting of Dinesh on two post cards, but it transpired that the document had been shown by the Police to the witness outside Court; upon this, the defence made the legitimate comment that the document had not been put to the witness in Court, because he had failed to recognise the hand-

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writing when it was shown to him outside. We observe, however, that notwithstanding these circumstances, the Sessions Judge proceeded, in his judgment, to compare the document with the writing on the post cards, with a view to determine whether it was in the handwriting of Dinesh. This is a course, which has not commended itself to high authority: *Barindra Kumar Ghose* v. *Emperor* (1), *Kurali Prasad* v. *Anantaram*, (2). Whether the cipher list, however, was or was not written by Dinesh himself, is not very material for the present enquiry. It has been deciphered and turns out to be a list of names of persons, who apparently paid a small monthly subscription for some purpose undisclosed. The defence has suggested that this was probably a list of subscribers to the library which Sasanka kept in the room: it has also been urged that, in any event, the list does not connect Dinesh with any criminal conspiracy. This is perfectly true, yet one cannot but observe that it would have materially helped the case for the defence, if Dinesh had offered a true explanation of the real nature and purpose of this apparently harmless document, instead of suggesting the very improbable theory that it had been planted in his coat pocket by an unscrupulous police spy. In this connection, reference may usefully be made to the following observations made by Tindal, C. J., in *Regina* v. *Frost* (3): "On the part of the prisoner, the learned Counsel who appear for him state, and I think they are justified in so stating, that he is not bound to show what was the object or purpose or intent of the acts that were undoubtedly done by the prisoner at the Bar. His Counsel say the offence charged against him must be proved by those

(1) (1909) I. L. R. 37 Calc. 437, 503; 14 C. W. N. 1114, 1138.
(2) (1871) 8 B. L. R. 490, 502.
(3) (1839) 4 St. Tr. N. S. 85, 443; 9 C. & P. 129; 2 Moody C. C. 140.

who made the charge, that he stands only to hear the evidence that is given against him, and therefore he is not bound to show at all or in any way whatever, what his real object or design was. Undoubtedly the proof of the case against the prisoner must depend for its support not upon the absence or want of any explanation on the part of the prisoner himself, but upon the positive affirmative evidence of his guilt that is given by the Crown. It is not, however, an unreasonable thing, and it daily occurs in investigations, both civil and criminal, that if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon, for his own sake and his own safety, to state and to bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence." In this particular case, however, as we have already said the document, though in cipher and thus calculated to excite suspicion, does not, when deciphered, incriminate the accused in whose possession it was found. Reference has lastly been made to the fact that the name of Dinesh appears in a list found at the search of the house of one Madan Mohan Bhoumik. This evidence is obviously valueless, but the Sessions Judge has also correctly held that it is not admissible against the accused. Nothing is known of Madan or of his activities, except that his name appears among some disconnected memoranda contained in a note book found in Sasanka's room, and the mere fact that Madan had chosen to enter the name of Dinesh in a list prepared by him for some unknown purpose, is obviously irrelevant for the purposes of this trial. On a review of the entire evidence, it is plain that the conspiracy charged against Dinesh cannot be supported.

We have next to consider the charge under section

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4 (*b*) of the Explosive Substances Act, 1908, against Chandra Sekhar, Saroda and Dinesh, against whom, as we have just found, the conspiracy charge has failed. It is obvious, indeed this was conceded by the Counsel for the Crown, that the charge under the Explosive Substances Act must necessarily fall along with the conspiracy charge. Reference was made to a number of judicial decisions to show under what circumstances a person may be deemed to be in possession of a moveable: *Queen-Empress* v. *Sangam Lal* (1), *Emperor* v. *Gajadhar* (2), *Kashi Nath* v. *Emperor* (3), *Ashruf Ali* v. *Emperor* (4), *Emperor* v. *Hamid Ali* (5), *Jogjiban* v. *Emperor* (6), *Peary Mohan* v. *Weston* (7), *Weston* v. *Peary Mohan* (8), *Kali Charan* v. *Emperor* (9) and *Nga Pu* v. *Emperor* (10). No useful purpose would be served by an analysis of the circumstances of the various cases discussed at the Bar. It is sufficient to say that while it is not necessary to prove manual possession of the explosive substance by the accused, it must be proved that it was in his power or control; possession to be punishable must also be possession with knowledge and assent. The mere fact that Chandra Sekhar, Sarada and Dinesh were in the room, does not show that they were in possession of all or any of the things contained therein; it is not shown that they were even aware of the existence of the tin cases, discs, and clamps, or that they were acquainted with their nature and purpose. We hold accordingly that the charge under Section 4 (*b*) of Act VI of 1908

(1) (1893) I. L. R. 15 All. 129.
(2) (1903) I. L. R. 25 All. 262.
(3) (1905) I. L. R. 32 Calc. 557.
(4) (1909) I. L. R. 36 Calc. 1016.
(5) (1909) I. L. R. 37 Calc. 24.
(6) (1909) 13 C. W. N. 861; 9 C. L. J. 663.
(7) (1911) 16 C. W. N. 145.
(8) (1912) I. L. R. 40 Calc. 898, 922.
(9) (1913) I. L. R. 41 Calc. 537; 18 C. L. J. 514; 18 C. W. N. 309.
(10) (1911) 13 Cr. L. J. 122.

fails against each of these persons quite as much as the conspiracy charge. The result is in conformity with the well settled principle that when evidence at the disposal of the prosecution is insufficient to secure a conviction for the crime committed, it is inexpedient, even though it may be lawful to prosecute the accused for a conspiracy the proof whereof really rests on the establishment of that very crime: *Reg.* v. *Boulton* (1), *Emperor* v. *Lalit Mohan* (2).

We have to examine in the next place the case of Kalipada, who was arrested in College Street on the 6th December, 1913, with ten copies of the Liberty leaflet in his pocket. The only charge against him is that of conspiracy under section 120B, Indian Penal Code; there is no substantive charge against him under Section 4 of the Explosive Substances Act, 1908. As regards this accused, there has been a prolonged discussion on the question, how he came to be in possession of the liberty leaflets. Counsel on his behalf contended that the leaflets were planted in his pocket by a police spy, with a view to create evidence of conspiracy against him. This theory, which in our opinion has not been placed above the level of a bold hypothesis and has certainly not been established by the evidence, has been indignantly repudiated by the prosecution; the Crown has further sought to prove affirmatively, that the leaflets were printed by Kalipada himself at the Loke Nath Press where he was admittedly employed as a compositor. The evidence shows that Kalipada, whose real name is Upendra Lal Ray Choudhury, belongs to a respectable family, resident at Benotia in the district of Faridpur. Their circumstances have altered for the worse, and Upendra found himself driven to earn his livelihood in Calcutta,

(1) (1871) 12 Cox. 87, 92.

(2) (1911) I. L. R. 38 Calc. 559, 579; 15 C. W. N. 593, 606.

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where he came about the middle of the year 1912. He used to reside at 119-4, Upper Circular Road, and obtained employment as a compositor in the Loke Nath Press. He alleges that he adopted the name Kalipada Ghosh, because he felt that his humble occupation might bring discredit upon his family. He was employed in the press from October 1912 to the 6th October, 1913, on a regular monthly wage. Work in the press was thereafter temporarily suspended and his services were terminated. He was re-employed, however, on a daily allowance from the 10th to 16th November, 1913. There is internal evidence to show that the liberty leaflet was written after the 30th September, 1913, as it makes mention of the College Square outrage which took place on the 29th September and the Mymensingh bomb outrage which happened on the following day. If, therefore, the leaflet was printed at the Loke Nath Press, it might then have been printed between the 1st and the 6th October or between the 10th and the 16th November. Elaborate evidence of a circumstantial character has been adduced by the Crown to show that the leaflet was printed at the Loke Nath Press. A minute comparison has been made of the types required to print the leaflet with the types found in the press, and quite a number of remarkable coincidences has been discovered. All the types necessary to print the leaflet were found in the press but the most striking fact in this connection is the presence of a damaged T, which must have been used to print some of the copies of the leaflet. The damage to this type was obviously caused by a pin which fell across the face as the printing was in progress. It is extremely improbable that a similar accident to a similar type should have happened in some other press. More than this, coincidences almost equally remarkable have been noticed

in the case of types of other letters which had either been damaged or had some special feature, some peculiarity in form or shape. This part of the case does not require much elaboration, because we agree in the conclusion of the Sessions Judge that the evidence, though circumstantial, is practically conclusive. We hold then that the liberty leaflets found in the possession of Kalipada were printed at the press where he was employed as a compositor, and it is probable that they were printed by him. There is also indisputable proof that during the whole of the period that Kalipada was employed as a compositor, he was on friendly terms with Sasanka. They regularly took their meals at the same eating-house; there is also evidence to show that Sasanka guaranteed regular payment by Kalipada whom he introduced to the hotel-keeper; it is further clear that as Sasanka moved from one hotel to another, Kalipada followed him. The question consequently arises, how far this association between Sasanka and Kalipada carries the case against the latter. In this connection, it must not be overlooked that there is no evidence to show that the "liberty leaflets" were printed by Kalipada, at the instance or under the direction of Sasanka, and that when the leaflets were first found in his possession Sasanka had already been in custody for two weeks. But it has been suggested on behalf of the Crown, that they must have been actually printed before Sasanka was arrested. If it be assumed, however, that they had been printed by Kalipada under the direction of Sasanka it is remarkable that no copy was found when his room was searched on the 21st November. But even if the theory be accepted that the leaflets were printed by Kalipada under the direction of Sasanka, the case against Kalipada is not materially advanced. No doubt, the leaflet is a seditious document of an

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inflammatory character and advocates the use of bombs for purposes of assassination. But it does not follow that even if Sasanka employed Kalipada to print and disseminate seditious literature, he confided to him all his secrets and took him in as a member of the conspiracy to make and possess explosive substances. There is also no evidence to show that Kalipada was in any way an assenting party to the conspiracy in which Sasanka was engaged or that he was even aware of its existence. There is a further circumstance which militates against such an hypothesis. According to the prosecution, the conspirators had assembled on the night of the 20th November to hold an important conference; if this assumption be well founded it is remarkable that Kalipada should have been absent from that meeting. In fact, when all the circumstances come to be analysed, the two outstanding facts proved against Kalipada are that he was on friendly terms with Sasanka and that a fortnight after the arrest of Sasanka he was arrested in College Street with copies of a revolutionary leaflet in his pocket which had been printed most probably by himself at the press where he was employed as a compositor. In our opinion, whatever suspicions one may entertain as to the mental tendencies of Kalipada, there is not sufficient evidence to connect him with the particular conspiracy charged.

We have next to consider the appeal preferred by the Crown against the acquittal of Khagendra Nath Choudhury. Evidence was adduced in the Sessions Court to prove that his real name was Khagendra Nath Choudhury and that he had assumed the name of Suresh Chandra Choudhury for a dishonourable purpose. Suresh, his fellow student and co-villager, had passed the Intermediate examination whilst he himself was unsuccessful; but he passed himself off

as Suresh to enable him to secure the appointment of a teacher in a school at Bhastara in the district of Hooghly. On behalf of the defence, it was contended that this evidence was inadmissible under section 54 of the Indian Evidence Act, but the objection was overruled. In our opinion, as it was admitted that Khagendra had assumed a false name, evidence should not have been allowed to prove the dishonourable purpose for which the false name had been assumed, a purpose no way connected with the conspiracy charged against him. It is an elementary rule that a man's guilt is to be established by proof of the facts and not by proof of his character; such evidence might create a prejudice but not lead a step towards substantiation of guilt. As Stephen observed in his General View of the Criminal Law of England (Ed. 1863, page 309) "a man's general bad character is a weak reason for believing that he was concerned in any particular criminal transaction, for it is a circumstance common to him and hundreds and thousands of other people, whereas the opportunity of commiting the crime and facts immediately connected with it are marks which belong to very few, perhaps only to one or two persons; if general bad character is too remote, *a fortiori*, the particular transaction of which that general bad character is the effect, are still further removed from proof; accordingly it is an inflexible rule of English Criminal Law to exclude evidence of such transaction." We must consequently take no account of the circumstances under which Khagendra assumed the name of Suresh. When we come to examine the evidence relevant to the conspiracy charge, we find this much established that he was acquainted with both Sasanka and Kalipada; he appears to have come down on more than one occasion from Bhastara to Calcutta on account of

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illness and to have stayed in the room of the one or the other in Upper Circular Road; in fact, in each of these rooms medicine prescribed for him and partially used was found. But the mere fact that Khagendra was acquainted with Sasanka and Kalipada and was possibly on friendly terms with them, is obviously insufficient to connect him with the alleged criminal conspiracy. Considerable stress, however, has been laid upon a lettter written by one Biroja from Calcutta on the 17th November, 1913, and found in the room of Khagendra at Bhastara. In this letter Biroja promises to send "new paper" in a few days. On behalf of the Crown it has been suggested that the new paper mentioned in the letter refers to the liberty leaflet; the suggestion, however, can take rank only as an unproved hypothesis. More than this, there is no evidence to show who this Biroja was, although, at the instance of the Crown he was named as a co-conspirator in the charge. We know nothing about his activities, and although an attempt was made by some of the prosecution witnesses to prove that a man named Biroja lived with Kalipada for a few days, that evidence when scrutinised turns out to be contradictory and unreliable. We agree with the Sessions Judge that the evidence is not sufficient to connect Khagendra with the particular conspiracy charged.

We may here conveniently deal with four important questions of law raised and discussed before us in connection with the procedure adopted in the Court below, with regard to the examination of the witnesses and of the accused.

It appears that, in more than one instance, when the prosecution had called a witness to prove a particular point (for instance, witnesses Rai Mohon Roy and Atul Chandra Das Gupta), the defence directed the cross-examination to matters wholly unconnected with

the examination-in-chief, but yet relevant for the purposes of the trial. Two questions thereupon arose, *first*, whether in a cross-examination of this description, leading questions could be put to the witness; and, *secondly*, whether the prosecution was entitled to test, by way of cross-examination, the veracity of their own witness with regard to the matters elicited by the defence in cross-examination. The answer to these questions must depend upon the provisions of the Indian Evidence Act. Section 138 is in these terms "witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined."

"The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief."

"The re-examination shall be directed to the explanation of matters referred to in cross-examination, and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

Section 143 provides as follows :—

"Leading questions may be asked in cross-examination."

Section 154 is in these terms :—

"The Court may, in its discretion, permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party." It is consequently plain that the accused were entitled, in cross-examination, to elicit facts in support of their defence from the prosecution witnesses, though the facts thus elicited had no relation to the facts to which the witnesses had testified on their examination-in-chief. It is also plain that, in course of cross-examination of this character, the

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defence were entitled, in view of the generality of the provision of Section 143, to ask leading questions. It is finally obvious that the Court might, in its discretion, under Section 154, permit the prosecution to cross-examine the witness, even though he had been originally called by them, with regard to the matters elicited by the defence. Indeed, in such circumstances, it would be generally an improper exercise of discretion to refuse the prosecution an opportunity to cross-examine the witness for the purpose indicated. This view is in accord with the law as administered in England. It has been ruled there that though leading questions may, in strictness, be put in cross-examination, even though the witness be favourable to the cross-examiner [*Parkin* v. *Moon* (1)], yet when a vehement desire is betrayed to serve the interrogator, it is certainly improper and greatly lessens the value of the evidence, to put the very words into the mouth of the witness which he is expected to echo back: *R.* v. *Hardy* (2). Again as the cross-examination is not limited to the matters upon which the witness has been examined-in-chief, but extends to the whole case, it would be obviously unfair to allow the evidence brought out in cross-examination to pass unchallenged: *Morgan* v. *Brydges* (3), *R.* v. *Murphy* (4). The question was elaborately reviewed by Shaw, C.J., in *Moody* v. *Rowel* (5) where the learned Chief Justice summed up his opinion as follows:—"There is one authority directly in point, where the objection was taken, and it was decided by Lord Kenyon that such leading question is admissible: *Dickinson* v. *Shee* (6). So in several recent cases, it has been held that where a witness is called to a particular fact, he is a witness

(1) (1836) 7 C. & P. 409.
(2) (1794) 24 St. Tr. 755.
(3) (1818) 2 Starkie 314.
(4) (1841) 1 Arm. M. & O. 206.
(5) (1835) 17 Pickering 490.
(6) (1801) 4 Esp. 67.

to all purposes and may be fully cross-examined as to the whole case, and no distinction is suggested as to the mode of cross-examination: *Morgan* v. *Brydges* (1), *Rex* v. *Brooke*(2). The weight of authority is in favour of the right to put leading questions under the circumstances stated, and this is confirmed by practice and experience." As is pointed out in Taylor on Evidence (Art. 1432), in the United States, the difficulty is avoided by the adoption of the logically consistent rule that a party has no right to cross-examine any witness, except as to circumstances connected with matters stated in his examination in-chief, and if he wishes to examine him respecting other matters, he must do so by making him his own witness and by calling him as such in the subsequent progress of the cause. (See the judgment of the Supreme Court of the United States delivered by Mr. Justice Story in *Philadelphia & Trenton Railway Company*, v. *Stimpson* (3)). The view we take is to some extent supported by the decision of the Judicial Committee in *Kalagurla* v. *Yarlagadda* (4). It may finally be added, that matter is eminently one in the discretion of the trial Judge, and his decision is practically conclusive: *Price* v. *Manning* (5), *Rice* v. *Howard* (6).

In the course of the trial before the Sessions Judge, a persistent effort was made by the defence to elicit from individual prosecution witnesses whether he was a spy or an informer, and, also to discover from Police officials the names of persons from whom they had received information. The Sessions Judge disallowed questions of this character, and in our opinion, the course he adopted was correct. In *R.* v. *Bernard* (7),

(1) (1818) 2 Starkie 314.
(2) (1819) 2 Starkie, 472; 20 R. R. 723.
(3) (1840) 14 Peter, 448.
(4) (1902) 6. C. W. N. 513.
(5) (1889) 42 Ch. D. 372.
(6) (1886) 16 Q. B. D. 681.
(7) (1858) 1 Fos. & Fin. 240; 8 St. Tr. N. S. 887, 935.

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when objection was taken to a question put to a witness, whether he had gone to a certain place as a spy, Lord Campbell allowed the objection to prevail, on the ground that the question was not relevant, and that the witness was really called upon to draw an inference from facts within his knowledge. Again in *R.* v. *Smith O'Brien* (1), it was ruled that disclosures made by informers to the Government, the magistracy or the police, with the object of detecting and punishing offenders, were privileged. Reference was made to the general rule formulated by Eyre, C. J., in *R.* v. *Hardy* (2). "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner, but there is a rule, which has universally obtained on account of its importance to the public for detection of crimes, that those persons, who are the channel by means of which that detection is made, should not be unnecessarily disclosed: if it can be made to appear that really and truly it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it, but it does not appear to me that it is within the ordinary course to do it." It may now be taken as settled rule that witnesses for the Crown in Criminal prosecutions undertaken by the Government are privileged from disclosing the channel through which they have received or communicated information [*R.* v. *Watson* (3), *R.* v. *Richardson* (4), *A. G.* v. *Briant* (5), *Marks* v. *Beyfus* (6)] but it has been ruled that a detective cannot refuse on grounds of public policy to answer a question as to where he was secreted: *Webb* v. *Catchlove* (7).

(1) (1849) 7 St. Tr. N. S. 2, 123.
(2) (1794) 24 St. Tr. 199 1, 808.
(3) (1817) 32 St. Tr. 1, 100.
(4) (1863) 3 Fos. & Fin. 693.
(5) (1846) 15 M. & W. 169; 71 R. R. 610.
(6) (1890) 25 Q. B. D. 494.
(7) (1886) 3 T. L. R. 159.

A question has been raised here as to the procedure provided in section 360, sub-section (1) of the Criminal Procedure Code. The Sessions Judge appears to have strictly carried out the provisions of the section, which require that the evidence of each witness as it is completed shall be read over to the witness in the presence of the accused, if in attendance or of his pleader if he appears by a pleader. This procedure appears to have occupied considerable time, but in view of the decisions in *Mohendra Nath* v. *Emperor* (1), and *Jyotish Chandra* v. *Emperor* (2), which are in accord with the case of *Kamatchinathan* v. *Emperor*(3), and were binding on the Sessions Judge, it must be ruled that the procedure be followed is not open to criticism. We may add that in a case of this description, where every possible point was likely to be contested, a strict compliance with the statutory provisions was manifestly desirable.

A question has been raised in this Court as to the propriety of the procedure adopted by the Sessions Judge when he accepted written statements from the accused, and our attention has been drawn to *Emperor* v. *Ansuiya* (4). It is sufficient to state that no objection was taken by the Crown in the Court below when the statements were tendered and received. The procedure followed in this case is in accordance with what we believe is the universal practice in the Courts of this Province, and we do not feel pressed by the doubt suggested in the case mentioned. But it is desirable to state explicitly that such a written statement does not take the place of evidence nor of such examination of the accused as is contemplated by the Code.

Only one other question now requires consideration,

(1) (1908) 12 C. W. N. 845.
(2) (1909) I. L. R. 36 Calc. 955.
(3) (1904) I. L. R. 28 Mad. 308.
(4) (1903) All. W. N. 1.

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namely, the question of sentence upon Sasanka. Counsel on his behalf pressed for a reduction of the sentence, should our ultimate conclusion be in favour of conviction. The Crown, on the other hand, has obtained a rule for enhancement of sentence. After anxious consideration of the matter, we have formed the deliberate opinion that the order of the Judge should not be touched in this respect. The offences, of which Sasanka has been proved to be guilty, are of the gravest character, and their heinousness is, if possible, accentuated by the fact that the bombs under construction, if completed, would have been employed for the destruction of human life. The demands of justice, consequently, require a deterrent sentence. At the same time, we are of opinion that the maximum sentence should be reserved for offences of even a worse description, which it is not difficult to imagine, might fall within the scope of the Explosive Substances Act. From these points of view, the sentences passed on Sasanka by the Sessions Judge are appropriate and should not be disturbed.

The result of our decision may be now summarised. Appeal No. 587 of 1914 preferred by Amrita *alias* Sasanka is dismissed. Appeals Nos. 588, 589, 590 and 598 preferred by Dinesh, Saroda, Chandra Sekhar and Upendra *alias* Kalipada are allowed. The convictions and sentences upon each of these persons are set aside, and we direct that they be released from custody. Appeal No. 4 of 1914, preferred by the Crown against the acquittal of Khagendra *alias* Suresh is dismissed. Rule No. 1293, issued at the instance of the Crown for enhancement of sentence, is discharged.

G. S.

Appeals Nos. 588, 589, 590 and 598 of 1914 allowed.
Appeals Nos. 587 and 4 of 1914 dismissed.
Rule No. 1293 of 1914 discharged.

PRIVY COUNCIL.

RAM KANAI SINGH DEB DARPASHAHA

v.

MATHEWSON.

P.C.* 1915

Jan. 19, 20, 21 ; *Feb.* 9.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Patni Lease—Chota Nagpur Encumbered Estates Act (Beng. VI of 1876 as amended by Act V of 1884) s. 17—Rules under s. 19 of Act, Rule 16—Patni lease executed by Deputy Commissioner as manager of Barabhum Estate under the Act—Sanction of Commissioner—Objection that patni lease had not been submitted to Commissioner after he had sanctioned all the details—Sanction granted for lease to a firm and lease given to a Limited Company—Stipulation for payment of Bonus—Payment after time fixed.

The grant of a patni lease under the Chota Nagpur Encumbered Estates Act (Bengal Act VI of 1876 as amended by Act V of 1884) s. 17 and rule 16 of the rules made under the Act, necessitate the sanction of the Commissioner. In a suit to have a patni lease, executed by the Deputy Commissioner as the manager under the Act of the Barabhum Estate on behalf of the proprietor, the father of the plaintiff (appellant) declared void and inoperative as not having received a valid sanction :—

Held, that where it has been affirmatively established that a transaction itself in all its essential particulars has obtained the sanction of the Commissioner, and then it becomes requisite that the transaction be carried into effect by the preparation of an appropriate deed, an objection merely on the ground that the document ultimately prepared has not been submitted for sanction, cannot be sustained. In administrative and departmental action it must necessarily be the case that formal details may have to be entered upon in order to carry into effect, and put into legal shape the arrangement to which the sanction was given.

Where such a sanction was given for a patni lease to be granted to "Robert Watson and Co.," a firm of individual men, and the actual lease was executed in favour of "Robert Watson and Co., Limited," the firm having been converted into a Limited Company :—

* *Present* : LORD SHAW, SIR GEORGE FARWELL, SIR JOHN EDGE, AND MR. AMEER ALI.

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Held, on the facts of the case, that when the negotiators in the course of the correspondence mentioned "Robert Watson and Co.," they did in fact mean and were perfectly understood to mean "Robert Watson and Co, Limited," the fact of the incorporation of the Limited concern being well known, and that therefore the misdescription did not, under the ordinary principle applicable to such matters, affect the validity of the sanction or of the patni lease. In this view it was unnecessary to decide as to the effect in law of the difference in the "*persona*" of the two descriptions.

Held, also, that the sanction of the Commissioner in this case was not merely a sanction of a proposal to grant a patni. The proposal had been made; it had been accepted; a contract was accordingly completed on the subject, and it was that contract so completed that was sanctioned.

The patni lease stipulated for the payment of a *salami* or bonus, and the letter granting the sanction contained the clause, "provided the amount be paid before the end of March 1890. Some delay occurred owing to an exchange of views being necessary as to the actual wording of the draft patni, but the lease was finally settled by both parties, and the *salami* was paid on 25th June 1890:—

Held, that the lease would not afterwards have been open to a challenge to be made by the Deputy Commissioner himself, or for the Commissioner's sanction to be withdrawn; and *a fortiori* there was no ground for sustaining such a challenge when put forward long afterwards on behalf of the debtor's successor by whom the suit was brought.

APPEAL No. 62 of 1913 from a judgment and decree (28th April 1910) of the High Court at Calcutta, which affirmed a judgment and decree (25th November 1907) of the Subordinate Judge of Manbhum, dismissing the suit.

The plaintiff was the appellant to His Majesty in Council.

The only question for determination on this appeal was as to whether a patni lease, dated 29th June 1890, granted by the manager of the Barabhum Encumbered Estate appointed under Bengal Act VI of 1876 was *ultra vires* and invalid.

The plaintiff was the son and successor of Raja Brojokishore Singh Deb Darpashaha of Barabhum in the district of Manbhum, who on 27th February 1883 borrowed Rs. 60,000 from Messrs. Robert Watson and

Co. on a mortgage of his Barabhum Estate, and on the same day executed an ijara lease in their favour of the entire estate (except a small portion specified in the lease) for a term of 21 years at a rental of Rs. 20,000 (afterwards reduced to Rs. 19,000) per annum. The lease contained a condition that if during the term the Company should desire to take a patni or permanent lease of such portions of 84¼ villages included in the properties leased, as were treated as ghatwali lands, the Rajah would grant such patni at a rental of Rs. 4,500 per annum on payment of a *salami* of Rs. 30,000.

On 8th March 1885, Messrs. Robert Watson and Co. having expressed a desire to have a patni lease as above it was granted to them by the Raja. The lease contained provisions (*inter alia*) vesting in the patnidars all rights over minerals (subject to the rights of a Mr. Kenny which were specially provided for) and timber in and on the lands demised.

On 6th March 1889, the Raja's estate, which was then heavily encumbered, was at his request taken under the protection of Government in accordance with the provisions of the Chota Nagpur Encumbered Estates Act (Bengal Act VI of 1876).

On 26th May 1890, the firm of Messrs. Robert Watson and Co. was converted into a Limited Lability Company, a formal conveyance being executed to effect that object. Both the Raja and the Deputy Commissioner (the manager of the Raja's estate under the Act) had notice of this conversion.

Difficulty was experienced in making arrangements for the liquidation of the Raja's debts, and various proposals made by the Raja for the purpose were from time to time considered and rejected; but on 25th October 1889, the Deputy Commissioner proposed to the Commissioner that in order to pay the debts a

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patni lease should be given to Messrs. Watson and Co. of the remaining portions (the lands not ghatwali) of the 84¼ villages at their then rental in consideration of a *salami* of Rs. 38,496. Though approved by the Commissioner, Messrs. Watson and Co. declined it on the ground that the terms were too onerous. They subsequently offered, however, to take the proposed patni lease if the *salami* was reduced to Rs. 30,000, and the Deputy Commissioner, on 6th February 1890, reported this offer to the Commissioner and recommended its acceptance.

In a letter of 20th February 1890, the Commissioner sanctioned the grant of a patni lease in the following terms:—"I have no desire to drive a hard bargain with Messrs. Watson and Co., and accordingly sanction the proposal to grant them a patni lease of the 84¼ villages excluded from the present patni, on payment of a premium of Rs. 30,000, provided the amount be paid before the end of March 1890."

Negotiations took place as to the form of the lease, and the draft had to be altered and corrected more than once before it was finally settled; and on 13th May 1890, the Deputy Commissioner reported to the Commissioner (in reference to a scheme he proposed for the settlement of the debts of the estate) that the salami had not been paid, but that the draft as altered and corrected had been sent to Messrs. Watson and Co. for their approval. The Commissioner approved the scheme, and the draft was thereupon finally settled by both parties, and on 25th June 1890 Messrs. Watson and Co. paid the *salami*, Rs. 30,000, to the manager.

On 29th June 1890, the Deputy Commissioner in pursuance of the Commissioner's sanction granted the patni lease now in suit to Messrs. Watson and Co., Limited. The rent reserved was Rs. 3,069-3-10, but except for this the provisions of the lease were

substantially the same as those contained in the former patni granted by the Raja himself.

On 28th June 1890, however, the Raja presented a petition to the Deputy Commissioner objecting to any such arrangement being entered into mainly on the grounds that the *salami* was insufficient, and that some of the villages included in the grant were held by *khorposhdars* of his family. The first objection was overruled by the Deputy Commissioner as manager, and the second was settled by Messrs. Watson and Co. undertaking not to resume or enhance the quit-rent or cesses of the *khorposh* villages so long as the estate remained under Act VI of 1876.

The Raja appealed to the Commissioner who, after going thoroughly into the whole matter, confirmed the grant, and an appeal to the Board of Revenue was dismissed, the Board of Revenue confirming the Commissioner's decision.

Messrs. Watson and Co. and their successors thereafter remained in possession of the properties in suit as patnidars; and on 15th April 1896 they conveyed all their rights therein to H. Mathewson the first respondent, and on 25th June 1906 the first respondent conveyed the same to the second respondent, the Midnapur Zamindari Co., Limited.

The Raja died on 22nd July 1900, and was succeeded by Raja Ram Kanai Singh Deb Darpashaha, the first appellant, who on 14th August 1906 (the Barabhum Estate having been released from the operations of Bengal Act VI of 1876 on 1st October 1905) instituted the suit which gave rise to the present appeal, claiming a declaration that the patni lease of 29th June 1890 was void and inoperative on the ground so far as this appeal was concerned, that it had not been validly sanctioned by the Commissioner.

The defence, so far as material, was that the patni

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lease had been duly sanctioned and was valid; that the payment of the *salami* was not a condition precedent to the grant of the lease; and that, if it were, that condition had been waived by subsequent agreement, and the conduct of the parties.

The Subordinate Judge found that it appeared from the correspondence that the patni lease was in every way in accordance with the sanction of the Commissioner; that Messrs. Robert Watson and Co. and Messrs. Robert Watson and Co., Limited, were in fact the same persons; that as regards the time for payment of the salami stipulation was not of the essence of the contract, and that if it were it was waived, for it was clear that the Commissioner knew when the scheme was confirmed that the money had not been paid, and that he refused to set aside the patni in the Raja's appeal with full knowledge of the facts; and that both the Commissioner and the Deputy Commissioner were well acquainted with the nature of a patni and did not believe or understand it to be a mere perpetuation of the ijara lease. In the result he held the patni lease was valid and binding, and further holding that the suit was barred by limitation, dismissed it with costs.

An appeal to the High Court from that decision was heard by WOODROFFE and RICHARDSON JJ. who after holding that the suit was not barred by limitation as decided by the Subordinate Judge, further decided that the sanction given by the Commissioner was sufficient to cover the patni granted by the Deputy Commissioner; that it was not established that the terms of the patni were unusual in character; that it must be assumed that the patni sanctioned by the Commissioner was not to be merely a perpetuation of the ijara lease; that even assuming that the payment of the *salami* in terms of the Commissioner's sanction constituted a condition precedent, it was waived by

the Commissioner; that no ground had been made out for saying that the sanction granted was invalid or that the patni lease was void or inoperative; and that it was within the powers conferred by Bengal Act VI of 1876 and the rules made under it. The appeal was accordingly dismissed with costs.

After this appeal was filed, the estate of the appellant was again brought under the Chota Nagpur Encumbered Estates Act, and by an order of this Board dated 5th March 1914, Mr. S. R. Hignell, Deputy Commissioner of Manbhum and manager under the Act, was added as an appellant.

On this appeal,

Upjohn K.C. and *A. M. Dunne*, for the appellents, contended that at the date of the execution of the patni lease in suit there was no valid sanction for it; and at that date the Deputy Commissioner had no right or authority to execute the lease, and was not justified in doing so in the face of the Raja's objections. Sanction of the Commissioner was necessary under the Chota Nagpur Encumbered Estates Act (Bengal Act VI of 1876, as amended by Act V of 1884) section 17, and rule 16 of the rules made under section 19 of the Act. The sanction should have been given only when the document which contained the terms of the patni lease was ready for execution. [*De Gruyther K.C.* referred to *Gulab Singh* v. *Gokuldas* (1): the document need not be submitted to the Commissioner, and the sanction may be implied.] That was a decision on the construction of a different Act (The Central Provinces Government Wards Act (XVII of 1885) section 18, the wording of which distinguished it from the present case. In that case the sanction was required of a permanent official, the Head of the

(1) (1913) I. L. R. 40 Calc. 784; L. R. 40 I. A. 117.

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Central Provinces Government who would not be expected to go into details. In the present case it was the manager of the Encumbered Estates Act who had to obtain the sanction of the Commissioner. Reference was made to Act XVII of 1885, sections 1, 4, 17, 18, 25, and 30; Bengal Act VI of 1876, section 17; and the Manual of Wards' Attached and Encumbered Estates (Ed. 1897 Calcutta), Part III, "Encumbered Estates," pages 200, 202. Here also the Commissioner had only sanctioned the grant of the patni believing it to be a perpetuation of the ijara lease on the same terms, and on the condition that the *salami* should be paid by a certain date, whereas the patni granted included rights, especially in reference to *khorposh* or maintenance grants, and the *salami* was not in fact paid until after the date fixed in the Commissioner's letter of sanction. The Deputy Commissioner, it was submitted, had no power to waive the breach of what was a condition precedent attaching to the Commissioner's sanction; nor to revive a sanction which had lapsed. Again the patni lease as sanctioned was to a number of individuals, namely, Messrs. Robert Watson and Co.;" whereas the patni lease as granted was a lease to a Limited Company, namely, "Messrs. Robert Watson and Co.," Limited, which was far from being the same thing, being in fact a very important alteration in the grant, and one which made the sanction invalid. It did not authorise the grant to a Limited Company; and this change was never brought to the notice of the Commissioner. The Limited Company was incorporated in 1887, but did not take the conveyance of the property until May 1890. The question of the identity of the patnidars was very material, since they would be liable for the due payment of the rent, and for the performance of the contract, even if assigned. The Commissioner ought to have the terms of the patni

lease to be sanctioned or an abstract of them before him. All that he sanctioned was the proposal for the grant of a patni lease to be prepared and settled later. It was submitted, therefore, that the sanction of the Commissioner and the patni lease executed by the Deputy Commissioner were invalid, void, and inoperative.

De Gruyther, *K.C.*, and *Sir W. Garth*, for the respondents, contended that for the reasons given in their judgments both the Courts in India had rightly decided that all the objections made to the validity of the sanction, and to the binding effect of the patni lease were unsustainable both in law and in fact. There was no question of the conversion of the ijara to a patni. All the terms of the patni lease were known to all the parties concerned, including the Commissioner, and he was well acquainted with all the details connected with the transaction. The respondents relied on the case of *Gulab Singh* v. *Gokul Das* (1). Time was not a condition precedent to obtaining the sanction. That Messrs. Robert Watson and Co. had been converted into a Limited Company was a well known fact. They had put in a petition in May 1889 which was stated to be that of "Messrs. Robert Watson and Co., Limited." To call them "Messrs. Watson and Co.," was not really a misdescription, as it was understood by all concerned, that it referred to Messrs. Robert Watson and Co., Limited. The interests of the *khorposhdars* were not endangered in any way by the grant of the patni lease.

Counsel was stopped by the Court, and

Upjohn, *K.C.*, called on to reply, referred to rule 16 of the rules under Bengal Act VI of 1876, the true construction of which he contended was that the

(1) (1913) I. L. R. 40 Calc. 784 ; L. R. 40 I. A. 117.

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sanction should be given when the lease requiring sanction was complete.

The judgment of their Lordships was delivered by

LORD SHAW. This is an appeal from a judgment and decree of the High Court of Bengal, dated the 28th April 1910, affirming a judgment and decree of the Subordinate Judge of Manbhum, dated the 25th November 1907, dismissing the suit with costs. The main object of the suit was to obtain a declaration of the nullity of a putni lease, dated the 29th June 1890. The other demands in the plaint were consequential upon such a declaration of nullity being obtained. The only question argued in the appeal was whether the putni lease was *ultra vires* and invalid. *Feb.* 9.

The facts are briefly these. The first appellant, the plaintiff, is the son and successor of the late Raja Broja Kishore Singh Deb Darpashaha, the owner of the Barabhum estate. In 1883 the Raja borrowed Rs. 60,000 from Messrs. Robert Watson and Company on a mortgage of his estate, and on 27th February of that year he executed an ijara lease in their favour. This lease contained a condition that if the Company should desire to take a putni lease of such portions of 84¼ villages as were treated in the ijara as ghatwali lands, the Raja would grant such a putni on certain terms. On 8th March 1885 this putni was granted. Four years thereafter, viz., on 6th March 1889, the affairs of the Raja being deeply embarrassed his estate was placed under the protection of Government by virtue of the Chota Nagpur Encumbered Estates Act, 1876.

There were apparently considerable difficulties in arranging for the liquidation of the debts. After negotiations it was agreed that the remaining portions excluded from Messrs. Watson and Company's former putni lease should be demised to these creditors for a

sum of Rs. 30,000. Their Lordships have considered the documents and have no hesitation whatsoever in accepting the view that the true, and, in fact, only meaning of the transaction was that expressed in the Commissioner of Chota Nagpur's letter of the 20th February 1890, in which he sanctioned "the proposal to grant them a putni lease of the 84¼ villages excluded from the present putni."

The elements of the transaction being thus settled and the amount of the premium arranged, what remained to be done was to have the actual deed drawn up and executed. This was done. It has been argued before the Board that the putni lease which was sanctioned was to be a lease containing the terms of the ijara lease. The Board cannot assent. These two contracts are essentially different in character, the latter being of a temporary character, containing provisions and reservations suitable to a lease for a short duration. Their Lordships have no hesitation in accepting the judgment of the High Court which is thus expressed on this point :—

"The fact that the Raja had granted a previous putni lease was known to the Commissioner, and was, in fact, referred to in his sanction. It is reasonable to assume that the Commissioner understood its character when he was asked to sanction a similar putni. It would have been inconvenient that the subsequent putni should be on any different terms from the first, because, as pointed out in the course of the correspondence, the proposed new putni was in respect of villages which were scattered about in the area covered by the earlier putni, and the object of the second putni was to round up the Estate. I do not think, therefore, that this ground has been made out."

Apart from the point just dealt with, the putni lease actually granted is now challenged. The grounds of challenge may be compendiously and conveniently stated as follows :—

(i) It is said that the sanction was, upon a sound construction of the letter of 20th February 1890,

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merely a sanction of a proposal to grant a putni Their Lordships think the objection to be trivial. This proposal had been made, it had been accepted, a contract was accordingly completed on the subject, and it was that contract so completed that was sanctioned.

(ii) It was said that the sanction contained the clause "provided that the amount be paid before the end of March 1890." In the course of carrying out the bargain some delay, not very great, occurred. There was an exchange of views as to the actual wording of the draft putni, but the document was finally settled by both parties, and on the 25th June 1890 Messrs. Watson and Company paid the *salami* of Rs. 30,000 to the official manager of the estate, viz., the Deputy Commissioner. This being done, it does not appear to their Lordships that it would have been open thereafter for a challenge to be made, even by the Deputy Commissioner himself, or for the Commissioner's sanction to have been withdrawn. *A fortiori* there appears no ground for sustaining such a challenge when put forward after a considerable lapse of years on behalf of the successor of the debtor.

(iii) The last objection is of a twofold character. It is urged that the sanction of the Commissioner, being a statutory requisite in virtue of the Chota Nagpur Encumbered Estates Act of 1876, of the rules thereunder, and of the Act of the Governor-General No. V of 1884, such sanction was not given to the final and actual putni lease itself. This depends upon a construction, especially, of Rule 16, which is in the following terms :—

"The powers to lease under section 17 of the Act shall be subject to the following provision :—No lease shall be given for any term exceeding three years without the sanction of the Deputy Commissioner, or exceeding four years without the sanction of the Commissioner."

Upon this point their Lordships are of opinion that when it is affirmatively established that a transaction itself in all its essential particulars has obtained the sanction of the Commissioner, and when it is requisite that the transaction be carried into effect by the preparation of the appropriate deeds, a challenge merely on the ground that the document ultimately prepared had not been submitted for sanction cannot be sustained. In administrative and departmental action it must necessarily be the case that formal details may have to be entered upon in order to carry into practical effect, and put into legal shape, the arrangement to which sanction was adhibited. The first head of this objection accordingly fails. And it was further urged that in any view the transaction which was sanctioned was a transaction of a grant of a putni lease to Robert Watson and Company, in other words to a firm of individual men and not to Robert Watson and Company, Limited, *i.e.*, a different and incorporated *persona*. This demands careful consideration. There is this to be said for the objection, that the *persona* in the latter case is different from the *persona* in the former, and that a change in the lessee or putnidar ought to be treated as a change in essentials. It may be added that a putni lease of land, an agreement of an important and wide-reaching character might demand separate consideration, and point to a different conclusion when this essential was altered. Questions might arise, and difficulties suggest themselves with regard to a limited company against whom legal remedies at law might not be the same as in the case of individuals, and public and administrative considerations might come into play operative either in the way of restriction or refusal on account of a change in *persona* in the lessee. In the opinion of their Lordships, it is not necessary to pronounce any judgment upon this point

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in the present case. For their Lordships are of opinion that when the negotiators in the course of correspondence mentioned in their letters Robert Watson and Company, they did in fact mean and were perfectly understood to mean Robert Watson and Company, Limited, the fact of the incorporation of the limited concern being well-known; and, indeed, one of the principal documents of the case is the petition dated 14th May 1889, being the petition of Messrs. Robert Watson and Company, Limited, filing the account of the money due to them. It may be true that the limited concern is a different one from the previous and unincorporated firm, but in the language of the judgment of the High Court:—

"The misdescription does not, under the ordinary principle applicable to such matters, affect the validity of the sanction or the lease. Though there was such a misdescription, it is perfectly clear what was intended by the sanction, and that it was intended that the lease should be given and taken by the persons who are properly described as Messrs. Robert Watson & Co., Limited."

A point was taken to the effect that the putni transaction could not be held to have been ratified, seeing that it had not specifically taken into account the existence of *khorposh* or maintenance rights, over the property sold. These could in no view have been affected for the simple reason that the interests of third parties properly secured over the properties, were in no respect prejudiced. And as to the further point that in the event of the discontinuance of these rights a certain reversion would follow to the zemindar, their Lordships are of opinion that this reversionary right not being in fact embraced within the grant, no prejudice to any such right has occurred. The point accordingly fails.

Their Lordships are of opinion that the judgments of the Courts below are correct, and they will humbly

advise His Majesty that the appeal be dismissed with costs.

J. V. W. *Appeal dismissed.*

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Solicitors for the appellants: *Theodore Bell & Co.*
Solicitors for the respondents: *Burton, Yeates & Hart.*

APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C.J., and Woodroffe J.

KEDAR NATH MITRA

v.

DINABANDHU SAHA.*

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March 25.

Cheque, payment by—Effect of such payment—Part-payment—Limitation—Limitation Act (IX of 1908), s. 20—Continuous account.

If a cheque is delivered to a payee by way of payment and is received as such, it operates as a payment subject to a condition subsequent that if upon due presentation the cheque is not paid, the original debt revives.

Where such a cheque is signed by the debtor and paid in part-payment of the principal of a debt, the cheque being subsequently honoured, the proviso to s. 20 of the Limitation Act has been complied with.

Mackenzie v. *Tiruvengadathan* (1) distinguished.

Where the dealings between two parties give rise to a continuous account the whole forms one cause of action.

Bonsey v. *Wordsworth* (2) followed.

APPEAL by Kedar Nath Mitter, the defendant, against the judgment of Chaudhuri J.

Between the 7th January 1903 and the 28th September 1911, the plaintiffs sold and delivered to the defendant certain quantities of timber at certain rates, the aggregate price amounting to Rs. 9,997-7. Against

*Appeal from Original Civil No. 42 of 1914, in suit No. 1167 of 1912.

(1) (1886) I. L. R. 9 Mad. 271. (2) (1856) 18 C. B. 325, 334.

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these goods the defendant between the 5th April 1903 and 27th March 1912 made various part-payments amounting in the aggregate to Rs. 6,289-13-6.

This suit was instituted on the 21st December 1912 for the balance of Rs. 3,707-9-6 together with the sum of Rs. 704-3 alleged to be due for interest.

It was contended by the plaintiffs that they appropriated the earlier payments to the earlier debits and that inasmuch as the part payments with reference to the later debits were made by means of cheques drawn and signed by the defendant or his agent, the whole of the amount in suit was within the period allowed by the Law of Limitation.

It was contended by the defendant that the plaintiff's claim for the price of goods supplied to him, prior and up to the 16th December 1909, was barred by the Law of Limitation: the defendant admitted liability to the extent of Rs. 2,490-9-3 in respect of the goods supplied to him, on and from the 24th December 1909, and brought that sum into Court.

The main question in issue was whether a cheque given in part-payment of principal came within the purview of the proviso to section 20 of the Limitation Act.

The suit came on for hearing before Chaudhuri J., and on the 16th March 1914 his Lordship disallowed the plaintiffs' claim for interest and passed a decree in their favour for the sum of Rs. 3,707-9-6, observing as follows :—

"This is a suit for the recovery of a certain sum of money claimed to be due for the price of timber sold by the plaintiffs to the defendant, including a sum for interest. The facts of this case are not disputed, except with regard to the agreement for payment of interest. The plaintiffs annex to the plaint a statement of the goods sold and of the payments received. There is no dispute as regards them. The defendant however says that there was no agreement for payment of interest as alleged in the plaint, and also relies on the Statute of Limitations in respect of the price of

goods sold between Asar 1314 B. S. up to the 1st Pous 1316. This portion of the claim is said to be barred. There was undoubtedly an adjustment of accounts, on the 29th Chaitra 1313, corresponding to the 12th April 1907. Payments on account, however, continued to be made by the defendant by cheques, which, I find, was the defendant's ordinary method of payment, up to Chaitra 1318. I am excluding from this payments of small sums of money on the New khata day. On the adjustment mentioned about Rs. 650 was found due by the defendant. This amount was paid in instalments beginning from the 12th April 1907 up to 1st October 1908. There are therefore two questions to determine, namely (1) Was there any such agreement for payment of interest as alleged by the plaintiffs? (2) Is the claim between Asar 1314 and the 1st Pous 1316 barred by the Statute of Limitations; that is to say, do the payments by cheques operate in favour of the plaintiffs under the provisions of section 20 of the Limitation Act and keep alive his claim for the price of the goods supplied during this period? . . . . . "

"The next point is as regards the question of Limitation. Payments were admittedly made by cheques as alleged by the plaintiffs, and the question for my determination is whether a person drawing a cheque in favour of his creditor, by the fact of drawing such a cheque can be said to be making a payment, the fact of which appears in his handwriting. Now so far as the word "payment" is concerned, Lord Campbell in construing 9 Geo. IV. C. 14 Section 1, held that the word "payment" was used by the Legislature in a popular sense and cited Justice Maule's dictum in the case of *Maillard* v. *Duke of Argyle* (1) "Payment is not a technical word. It has been imported into law proceedings from the exchange and not from law treatises." So far as the Contract Act is concerned payments may be made in various ways. See section 50 of the Contract Act and the illustrations. It was held in *Sukhamoni Chowdhurani* v. *Ishan Chandra Roy* (2), that there was no particular mode or form of payment which was specified in the Limitation Act, that there were many modes in which payments might be made. In *Kariyappa* v. *Rachapa* (3) it was held that a settlement of account was a payment. The question is whether a cheque so drawn, paid and honoured, can be considered a payment and if it is a payment, does the fact of the payment appear in the handwriting of the debtor. I would not have entertained much doubt about this point, had it not been for the decision of a very eminent Judge in Madras in *Mackenzie* v. *Tiruvengadathan* (4), where it was held that a cheque was only an order for payment, that it did not evidence any payment at all, nor did it shew for what

(1) (1843) 6 Man. & Gr. 40.
(2) (1898) L. R. 25 I. A. 95, 101.
(3) (1900) I. L. R. 24 Bom. 493.
(4) (1886) I. L. R. 9 Mad. 271.

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purpose the payment was made. This case, I find, was considered by this Court in *Mandardhar Aitch* v. *Secretary of State* (1), where Mr. Justice Banerji said that he was not prepared to go quite so far as the Madras case did. So far as the payment by cheque is concerned, it has been held in a great many cases to be a payment when the cheque is honoured. In *Currie* v. *Misa* (2) it was held that a security of that character was taken as money's worth. In *Irving* v. *Veitch* (3) it was held that the date of payment by a bill drawn is the date of the delivery of the bill by the debtor, not the time of its payment. In various cases it was considered to be a conditional payment in the event of its being dishonoured. I will only refer to the case of *Turney* v. *Dodwell* (4) in this connection. I considered that a cheque drawn by a debtor in favour of his creditor specifying the amount to be paid which is in part of the claim then outstanding against him is a payment—the fact of which appears in the handwriting of the debtor, and therefore, I will allow the plaintiffs' claim to the extent of Rs. 3,707-9-6, the amount of principal with interest at 6 per cent. on decree and costs on scale No. II, 6 per cent. on the amount pending suit. Interest will cease to run on the amount paid into Court from the date of such payment.

From this judgment the defendant, Kedar Nath Mitra, appealed.

Mr. S. R. Das (with him *Mr. Rasul*), for the appellant. The claim of the plaintiffs for the price of goods prior and up to three years previous to the institution of the suit, was barred by the Law of Limitation. A cheque drawn by the debtor in favour of the creditor is not a payment—it is only an order for payment, and does not evidence the *factum* of payment: it would not support a plea of satisfaction: in any event the cheque could not be said to be a payment in the handwriting of the defendant; it was the Bank that made the payment: *Maher* v. *Maher* (5), *Mylan* v. *Annavi Madan* (6), *Mackenzie* v. *Tiruvengadathan* (7), *Mandahar Aitch* v. *Secretary of State*

(1) (1901) 6 C. W. N. 218.
(2) (1875) L. R. 10 Ex. 153, 164.
(3) (1837) 3 M. & W. 90.
(4) (1854) 3 E. & B. 136.
(5) (1867) L. R. 2 Exch. 153.
(6) (1905) I. L. R. 29 Mad. 234.
(7) (1886) I. L. R. 9 Mad. 271.

for India (1), *Ram Chandar* v. *Chandi Prasad* (2). The course of transactions between the parties did not constitute one account: each item constituted a separate contract. A tradesman can bring as many suits as there are items in his account: *Satcourie Singh* v. *Kristo Bangal* (3).

Mr. Zorab (with him *Mr. B. L. Mitter*), for the respondent. A cheque is payment and operates as extinguishment of a debt, unless dishonoured: *Marreco* v. *Richardson* (4), *In re Boswell* (5), and *Felix Hadley & Co.* v. *Hadley* (6). In the present case the cheques were honoured: hence it must be taken that payment was made on the dates the cheques were made over by the defendant and accepted by the plaintiffs. It is obvious the person making the payment was the defendant, and his signature to the cheques complies with the proviso to section 20 of the Limitation Act.

The dictum in *Mackenzie* v. *Tiruvengadathan* (7) is *obiter* and erroneous. There was one running account and the payments by cheques were part payments on account and so saved limitation: *Walker* v. *Butler* (8), *Irving* v. *Veitch* (9).

Mr. Das, in reply, referred to *Garden* v. *Bruce* (10) and s. 61 of the Contract Act.

JENKINS C.J. The only question that arises on this appeal is whether a cheque given in part-payment of principal is sufficient to take the case out of the Indian Statute of Limitation having regard to the terms of section 20 of that Act.

The facts are not in dispute. And if the cheque

(1) (1901) 6 C. W. N 218.
(2) (1897) I. L. R. 19 All. 307.
(3) (1869) 11 W. R. 529.
(4) [1908] 2 K. B. 584.
(5) [1906] 2 Ch. 359, 366.
(6) [1898] 2 Ch. 680.
(7) (1886) I. L. R. 9 Mad. 271.
(8) (1856) 6 E. & B. 506.
(9) (1837) 3 M. & W. 90.
(10) (1868) 37 L. J. C. P. 112.

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KEDAR NATH MITRA v. DINABANDHU SAHA.

JENKINS C.J.

is sufficient for the purpose of section 20 then this appeal must fail.

It seems to me clear that if a cheque be delivered to a payee by way of payment and is received as such by him it operates as payment and is an extinguishment to that extent of the debt, though this is no doubt subject to a condition subsequent that if upon due presentation the cheque is not paid the original debt revives. There is no suggestion in this case that the cheque upon presentation was not paid. In fact, it was, and so there was payment in the fullest sense of the term and thus a part of the principal of the debt has, before expiration of the prescribed period, been paid by the debtor to the creditor.

Then it is said that the proviso to the section has not been complied with. That proviso is that in the case of a part-payment of the principal of a debt the fact of the payment must appear in the handwriting of the person making the same. If I am right in the view that the cheque actually was a payment the very payment was in the handwriting of the person making the same. I cannot for a moment suppose that this proviso was inserted as a sort of a trap to enable debtors to escape from the result of what they have done, and yet that would be the practical result of the argument advanced on behalf of the appellant. It seems to me that the words of the Act are amply satisfied by the circumstances of this case and I say this notwithstanding the decision in the case of *Mackenzie* v. *Tiruvengadathan* (1), which is capable of distinction from the present.

A point was made before us as to the appropriation of payment and the nature of the plaintiff's claim. This has not been made a ground of appeal. But

(1) (1886) I. L. R. 9 Mad. 271.

even if it had been, it seems to me that it is valueless. It rests upon the supposition that where, as here, there is a continuous account there is a separate cause of action in respect of each item. That seems to me to be quite opposed to the true character of such accounts. In *Bonsey* v. *Wordsworth* (1), it was said, on the strength of the previous authorities, that "where a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided."

In my opinion the learned Judge was right in the conclusion at which he arrived. This appeal is dismissed with costs.

WOODROFFE J. I agree.

Appeal dismissed.

Attorney for the appellant: *H. N. Datta.*

Attorney for the respondent: *W. G. Rose.*

J. C.

(1) (1856) 18 C. B. 325, 334.

APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C.J., and Woodroffe J.

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Feb. 26

PATIRAM BANERJEE

v.

KANKNARRAH Co., LD.*

Sale of Goods—Bought and sold notes—"Bought by your order and for your account from our principals"—Principal and Agent—Personal liability of broker—Contract Act (IX of 1872), s. 230 (2)—Broker, an intermediary—Contract of employment—Award.

Where a broker signed and sent to a party a bought note in the following terms : "We have this day bought by your order and for your account from our principals . . . . 250 bales of jute . . . . . (name) Brokers," and a corresponding sold note was signed and sent by the broker to another party, the names of the principals being disclosed to each other, by the broker, at a subsequent date :—

Held, in proceedings taken by the buyer, that the broker was merely an intermediary and not an agent for sale, and was not liable under section 230 (2) of the Contract Act. The contract (if any) between the broker and the buyer was a contract of employment, the employment being to negotiate, and not to sell, on behalf of another.

Southwell v. *Bowditch* (1) followed.

Gubboy v. *Avetoom* (2) distinguished.

APPEAL by the plaintiff, Patiram Banerjee, from the judgment of Chitty J.

This appeal arose out of a suit brought by the plaintiff to set aside an award made under the rules of the Bengal Chamber of Commerce, and in the alternative for an indemnity.

On the 2nd June 1913, the plaintiff Patiram Banerjee in his firm-name of S. N. Banerjee & Co., put

* Appeal from Original Civil, No. 69 of 1914, in Suit No. 265 of 1914.

(1) (1876) L. R. 1 C. P. 374. (2) (1890) I. L. R. 17 Calc. 449.

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through a contract between the Kanknarrah Jute Mills Co., Ld., and K. D. Shaha for the purchase and sale of 250 bales of jute the shipment to be in September 1913. The bought note was addressed and sent to Messrs. Jardine Skinner & Co., Agents, Kanknarrah Jute Mills Co., Ld. It was in the following terms:—

"No. D/2382.

Indian Jute Manufacturers' Association.

Jute Contract.

Calcutta, 2nd June 1913.

Messrs. Jardine Skinner & Co.,

Agents, Kankinarrah Jute Mills Co., Ld.

DEAR SIRS,

We have this day bought by your order and for your account from our Principals—

Crop 1913-1914.	Two hundred and fifty kutcha bales of Dacca Dt. &/or Mymensingh district Jute,
Dacca Dt. &/or Mymensingh Dt. 3's	each bale weighing about 3½ mds. of the mark assortment and quality as per margin and in sound dry storing condition at Rupees ten only.
250 B/S.	per Calcutta Bazar Maund delivered free at buyer's Mill's Ghat by Rail &/or Steamer.
3's @ Rs. 10 per C. B. M. Landed	Weight, guaranteed at buyer's Mill Kankinarrah Jute Mills.
Guaranteed to yield after cutting good Hessian Warp 70% Sacking Warp.	Shipment within September 1913 to Kankinarrah Jute Mills.
	Insurance by seller with buyer's agency.
	Reimbursement draw on buyers against shipping documents.
% good Hessian Warp	Arbitration.—Any dispute arising out of this contract shall be referred to the arbitration of the Bengal Chamber of Commerce whose decision shall be accepted as final and binding on both parties to this contract.
% „ Sacking Warp	

Yours faithfully,

(Sd.) S. N. Bannerjee & Co.,

Brokers."

A corresponding sold note was addressed and sent to Babu K. D. Shaha on the same date.

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PATIRAM BANERJEE v. KANKNARRAH CO., LD.

On the 16th September, the plaintiff wrote two letters declaring Messrs. Jardine Skinner & Co., Agents, Kanknarrah Co., Ld. on the one hand, and Babu K. D. Shaha on the other, his principals in the contract, with a request to each party thenceforth to deal with the other party direct. On the 17th September Messrs. Jardine Skinner & Co. replied to the plaintiff in these terms: "We do not agree to accept your principal's name under this contract. The contract must therefore stand as originally made out." On the 29th September Messrs. Jardine Skinner & Co. called on the plaintiff to hand them at once the documents for 250 bales jute due on 30th September under the contract, and offering to hand him cash in exchange for documents, and on the 30th September the plaintiff replied requesting them to ask the seller direct for the jute under the contract. On the 3rd October Messrs. Jardine Skinner & Co., replied that they had applied to him (the plaintiff) direct for the delivery of the September portion of the contract, and that they did not recognise his sellers and could have no dealings with them, and asked him further to note that as he had not applied for extension of delivery, a bill for the difference would be made against him. On the same day the plaintiff appears to have intimated to K. D. Shaha for the first time, that Messrs. Jardine Skinner would not accept him as the principal under the contract, and on the 4th October he further wrote to K. D. Shaha asking him to note that as he (Shaha) had not applied for any extension for delivery of the September portion 250 bales his (the plaintiffs') bill for the difference would be submitted in due course.

On the 23rd October 1913, under cover of a letter addressed to S. N. Banerjee & Co.'s Principals, Messrs. Jardine Skinner & Co., presented their bill for the sum of Rs. 4,593-12, as "the market difference on the

jute" on the 30th September. On the 25th October, the plaintiff presented his bill for the difference to Babu K. D. Shaha.

On the 4th November, the Kanknarrah Co., Ld. called upon the plaintiff to pay the sum of Rs. 4,593-12, and on his failing to do so, they applied to the Bengal Chamber of Commerce for the appointment of arbitrators. Notice of the application for arbitration was duly sent to the plaintiff by the Registrar of the Bengal Chamber of Commerce. After two applications for time, the plaintiff repudiated the jurisdiction of the Chamber of Commerce and the arbitrators appointed by it, and refused to appear. Nor did Babu K. D. Shaha appear before the Tribunal. The arbitrators, however, proceeded with the arbitration and made their award, directing the plaintiff to pay Messrs. Jardine Skinner & Co., Managing Agents, Kanknarrah Co., Ld. the sum of Rs. 4,593-12 as. as the market difference on the due date of the contract and the sum of Rs. 197 as the costs of the arbitration.

Thereupon the plaintiff instituted the present action, to set aside the award joining as defendants Jardine Skinner & Co., the Kanknarrah Co., Ld. and K. D. Shaha. The grounds alleged in the plaint were, *inter alia*, (i) the plaintiff was not a party to the contract and there was no agreement by him authorising either party to refer claims against him to arbitration and no submission by him, ... (v) the dispute if any was between the Kanknarrah Co., Ld. and the plaintiff and not between the plaintiff and Jardine Skinner & Co., and (vi) that there was no evidence of authority of Jardine Skinner & Co. to refer the dispute of Kanknarrah Co., to arbitration.

The plaintiff further prayed that in case the award be held to be valid the defendant K. D. Shaha may be

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declared liable to indemnify him in respect of the claims made against him.

The suit came on for hearing before CHITTY J. On the 6th August 1914, his Lordship dismissed the suit against all the defendants. So far as Jardine Skinner & Co., were concerned, his Lordship held that they were acting merely in their capacity as Managing Agents of the Kanknarrah Co., Ld. So far as the other defendants were concerned, his Lordship's judgment was as follows :—

"So far as the plaintiff's case against the Kankinarrah Co., Ld. is concerned, it was argued that the contract and arbitration were not with that company at all, but with Messrs. Jardine Skinner and Co. With that I have already dealt. There can be no doubt whatever that the contract was one between the company and the seller, and that Messrs. Jardine Skinner & Co. were merely the Managing Agents carrying on the business of the company and working on its behalf. The company is a limited company and such matters would be naturally transacted by its Managing Agents. Then it is argued that the plaintiff did not submit to arbitration as between himself and the Kankinarrah Co., Ld. That appears to me to turn on the question of the plaintiff's liability under the contract. By section 230 of the Indian Contract Act in the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal nor is he personally bound by them. Such a contract is presumed to exist in certain circumstances, one of which is when the agent has not disclosed the name of his principal. Here he did not at first disclose the name of his principal and it would be presumed that the contract was, if necessary enforceable against him. He did however, at a later stage disclose the name of K. D. Shaha as his principal and the Kankinarrah & Co., Ld. through Messrs. Jardine Skinner & Co., declined to accept that person as seller. Now the obvious course for the plaintiff was to have told both the company and K. D. Shaha that as the company would not recognize K. D. Shaha as principal there could not be any contract between them. If he had done that, there was no answer and he clearly could not have been made liable in any way. The plaintiff however did not take this course. He did not even inform K. D. Shaha of what Messrs. Jardine Skinner & Co.. had said until 3rd October, when the time for performance had gone by. He accepted the position which they proposed in their letter of 17th September that the contract should stand as it was, namely with himself as broker and an undisclosed principal. He

would, therefore, be liable to the undisclosed principal. The question is raised, whether that covers the clause referring to arbitration? It is a nice point and so far as I know is not covered by authority. I have no recollection of its ever arising before but it appears to me that if the contract is enforceable against the broker as though he were a principal, it must necessarily follow that it is enforceable in its entirety and as he is entitled to the benefit of any clause in his favour, so also is he liable for any obligations which may be thrown upon him. He becomes for the purposes of the contract a party to the contract and I think that he must be taken to be bound by the clause which accepts the arbitration of the Bengal Chamber of Commerce and agrees to take the decision of that Tribunal as binding. The plaintiff in clause 10 of his plaint has put forward a number of grounds for setting aside the award, but the 2nd, 3rd and 4th grounds have not in any way been pressed. With the 1st, 5th and 6th grounds I have dealt. It follows, therefore that, so far as the Kankinarrah Co., Ltd. is concerned, the award must be held to be valid and binding on the plaintiff and cannot be set aside. Then there is the question whether the plaintiff has any claim to be indemnified by K. D. Shaha against the award, which stands against the plaintiff as a decree of this Court I do not think that he has any present case against K. D. Shaha for two reasons. In the first place he accepted the position that Messrs. Jardine Skinner & Co., for the Kankinnarrah Co., Ld. would not accept K. D. Shaha as a contracting party, and at the same time he appears to have regarded K. D. Shaha as a principal contracting party with himself. That is clear from his letters of 30th September and 25th October 1913 and by the fact that he billed K. D. Shaha as liable to him for non-delivery of the jute. If that be so it is obvious that he cannot now proceed against him as a principal for whose default the broker has been made liable. The second reason is that the plaintiff has not yet paid anything to the Kankinarrah Co., Ld. and cannot therefore ask K. D. Shaha to indemnify him in any particular amount. Mr. Pugh in reply for the plaintiff insisted very much on the principles laid down in *Wilmershanson* v. *Gullick* (1) I do not wish to appear as in any way dissenting from the correctness of that decision or of the various decisions which Mr. Justice Wright there reviewed. It appears to me that the facts there are totally different from the facts of this case. Here, moreover, we have the Contract Act which is perfectly plain. If this be regarded as an ordinary case of guarantee then by section 145 the surety is only entitled to recover from the principal debtor whatever sum he has rightfully paid on the guarantee, but not sums which he has paid wrongfully. Under Section 222 of the

(1) [1893] 2 Ch. 514.

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same Act the employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him. It may be doubted whether the plaintiff and K. D. Shaha any longer stood in the position of agent and employer having regard to the line which the plaintiff took up ; but even supposing it were so then K. D. Shaha would only be bound to indemnify the plaintiff against the consequences of his acts. We do not yet know what the consequences may be. It may possibly be that the plaintiff may compromise the case with the Kankinarrah Co., Ld. and have to pay very much less or even nothing at all, in respect of this award. It would obviously be premature in this case to pass a prospective decree against K. D. Shaha for payment of such sum as the plaintiff may have to pay to the Kankinarrah Co., Ld. For these reasons I think the suit fails against all the defendants and it must be dismissed with costs on scale No. 2."

From this judgment the plaintiff, Patiram Bannerjee, appealed. Messrs. Jardine Skinner & Co. were not made respondents in the appeal.

Mr. Sircar (with him *Mr. J. N. Sinha*), for the appellant. The award should be set aside on two grounds: (i) the plaintiff was not a party to the contract of the 2nd June 1913; and (ii) the arbitration clause in the contract did not refer to him. The parties to the contract were K. D. Shaha, the sellers, and Jardine Skinner as agents for the Kanknarrah Co. Ld., the buyers. Patiram Banerjee was merely the broker in the transaction. Not only the bought note was signed by the plaintiff as broker, but the note ran "bought from our principals." Jardine Skinner's letter dated the 23rd October enclosing their bill, was addressed to "S. N. Banerjee & Co.'s principals," clearly recognising the plaintiff's position as a mere broker. Section 230 of the Contract Act cannot apply to the circumstances of this case, where the broker is the common agent of both parties: otherwise that section read with section 222 would reduce the position to an absurdity, namely that the Kanknarrah Co., could claim a sum from the plaintiff under s. 230

and would have to indemnify him in the same sum under s. 222. Section 230 sub-cl. (*2*) merely speaks of a presumption arising. The language of the contract taken as a whole rebuts such a presumption. The only way the plaintiff can be made liable under section 230 is on the hypothesis that section 230 is a departure from the English law. All that *Gubboy* v. *Avetoom* (1) decided was that the expression "A. T. Avetoom for principal" did not rebut the presumption. That the presumption can be rebutted is clear from *Soopromonian Setty* v. *Heilgers* (2). The presumption would be rebutted by the terms of the contract.

The question is did the plaintiff intend to contract as a principal, and did the Mills ever think he was doing so. The Mills knew perfectly well the plaintiff was not acting as principal.

[JENKINS C.J. Does the "disclosure" contemplated by section 230 mean disclosure at the time the contract is made, or before enforcement ?]

[WOODROFFE J. If this was not a case of undisclosed principal on June 2nd, could it become a case of a disclosed principal in September ?]

Both sub-clauses (*2*) and (*3*) of section 23) contemplate that the principal should be disclosed before the completion of the contract: *Lakshmandas* v. *Anna*(3). The presumption does not arise, if disclosure is made subsequent to the contract.

[JENKINS C.J. It would appear this is not a case of undisclosed principal, but the case of a contract of employment.]

Yes: the plaintiff did not enter into the contract as an agent. The contract was between the buyer and seller.

Section 230 reproduces the English Law and is not

(1) (1890) I. L. R. 17 Calc. 449, 454. (2) (1879) I. L. R. 5 Calc. 71.
(3) (1904) I. L. R. 32 Bom. 356.

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in variance with it: *Hasonbhoy Visram* v. *Clapham* (1). On the English authorities the plaintiff is not liable. *Fleet* v. *Murton* (2) which is cited in *Gubboy* v. *Avetoom* (3) turned on a question of usage, and was wrongly applied in that case. The present case is governed by *Southwell* v. *Bowditch* (4): see *Mackinnon Mackenzie & Co.* v. *Lang, Moir & Co.* (5).

If it be held that the plaintiff was liable under the contract, it is submitted, in any event, he would not be bound by the arbitration clause, and hence the award must be set aside: *Piercy* v. *Young* (6). If the broker is to be held to come within the expression "both parties" in the arbitration clause, the effect would be that there may result three independent arbitrations. Lastly, if the plaintiff is held to be bound by the award, K. D. Shaha should be ordered to indemnify him: see section 222, Contract Act, and *Lacey* v. *Hill* (7).

Mr. Avetoom (with him *Mr. McNair*), for the Kanknarrah Co., Ld., the respondents. This is a case of undisclosed principal within the meaning of section 230 (2) of the Contract Act and the plaintiff is liable under the contract and bound by the award. The test is—to whom was credit given? It cannot be contended the Kanknarrah Co., gave credit to an unknown party. Who is to give the company delivery? If no disclosure at all had been made, it is submitted that both on the English and Indian authorities, the plaintiff would have been liable on the contract. By the letter of the 17th September the Company made it clear that they looked to the plaintiff to perform the contract. Patiram on his side made claims on Shaha

(1) (1882) I. L. R. 7 Bom. 51, 65.
(2) (1871) L. R. 7 Q. B. 126.
(3) (1890) I. L. R. 17 Calc. 449.
(4) (1876) I. C. P. D. 374.
(5) (1881) I. L. R. 5 Bom. 584.
(6) (1879) L. R 14 Ch. D. 200.
(7) (1874) L.R. 18 Eq. 182, 191.

equivalent to those made on him. The whole English Law on the point is set out in Benjamin on Sale 5th edition page 256: see *Hutcheson* v. *Eaton* (1). The present case is covered by the ruling in *Gubboy* v. *Avetoom* (2): see also *Soopromonian Setty* v. *Heilgers* (3).

[JENKINS C.J. In the present case the broker was not an agent to sell but merely an intermediary. The ruling in *Gubboy* v. *Avetoom* (2) turned on the construction put on the words "A. T. Avetoom for principal."]

By not disclosing the name of the principal the broker increased his liability and incurred that of a principal: *Parker* v. *Winlow* (4). The principal must be disclosed at the time the contract is made: section 92 of Evidence Act would prevent subsequent disclosure: *Soopromonian Setty* v. *Heilgers* (3). In *Ramji Das* v. *Janki Das* (5), it was held that if in fact there was a principal though undisclosed, s. 230 (*2*) would apply.

[JENKINS C.J. That case does not throw any light on the question whether Patiram was a mere negotiator or an agent to sell. If he was an agent, section 230 would apply, if only a negotiator, it would not. Refers to *Paul Beier* v. *Chotalal Javerdas* (6).]

If the plaintiff is deemed to be a party to the contract, the arbitration clause must apply to him.

Mr. Sircar, in reply. In *Gadd* v. *Houghton* (7) where *Parker* v. *Winlow*(4) was cited, it was held that the broker was not liable. In *Gubboy* v. *Avetoom*(2), there was nothing to show that at the date of the contract there was in fact a principal: see also

(1) (1884) L. R. 13 Q. B. D. 861.
(2) (1890) I. L. R. 17 Calc. 449.
(3) (1879) I. L. R. 5 Calc. 71.
(4) (1857) 7 E. & B. 942.
(5) (1912) I. L. R. 39 Calc. 802.
(6) (1904) I. L. R. 30 Bom. 1.
(7) (1876) L. R. 1 Ex. D. 357.

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Keighly Maxsted & Co. v. *Durant* (1). A distinction is to be drawn between the position of broker and that of an agent: *Adams* v. *Hall* (2).

The terms of the contract as a whole must be considered: *Glover* v. *Langford* (3). The terms of each contract must be considered on their own merits and not with reference to *similar* contracts: *Bristol Water Works Co.* v. *Wren* (4), amplifying the ruling of Jessel M. R. in *Southwell* v. *Bowditch* (5).

Mr. S. R. Das (with him *Mr. P. R. Das*), for K. D. Shaha, the respondent. The plaintiff was not my agent to sell: if he has acted as principal, it was not my contract and I am not liable. If even he was my agent to sell, I am not liable to indemnify him for *all* consequences—there was no default on my part: *Halbronn* v. *International Horse Agency and Exchange Ld.* (6). Lastly the plaintiff did not take the necessary steps to protect my interests.

Cur. adv. vult.

JENKINS C.J. The plaintiff carries on business as a jute-broker under the name of S. N. Banerjee and Co. He has brought this suit for a declaration that an award dated the 14th February 1914 is invalid and inoperative, and for consequential relief. In the alternative he seeks a decree for indemnity.

This award professes to have been made on a dispute between Messrs. Jardine Skinner and Co., Managing Agents Kanknarrah Co., Ld. and Messrs. S. N. Banerjee and Co., with reference to a claim for damages for non-delivery of 250 bales jute bought and sold under contract No. D/2382 of 2nd June 1913.

(1) [1901] A. C. 240, 244.
(2) (1877) 37 L. T. R. 70.
(3) (1892) 8 T. L. R. 628.
(4) (1885) 15 Q. B. D. 637, 645.
(5) (1876) L. R. 1 C. P. D. 374, 378.
(6) [1902] 1 K. B. 270.

The bought note was in these terms :—

"No. D/2382.

Indian Jute Manufacturers' Association

Jute Contract.

Calcutta, 2nd June 1913.

MESSRS. JARDINE SKINNER & CO.,

Agents, Kanknarrah Jute Mills Co., Ld.

DEAR SIRS,

WE have this day bought by your order and for your account from our Principals.

(Here follows a description of the jute and provisions not material at this stage.)

Arbitration—Any dispute arising out of this contract shall be referred to the arbitration of the Bengal Chambers of Commerce, whose decision shall be accepted as final and binding on both parties to this contract.

Yours faithfully,

(Sd.) S. N. BANERJEE & CO.

Brokers."

A corresponding sold note was sent to Babu K. D. Shaha on the same date.

On the 16th September 1913, S. N. Banerjee & Co., by letter declared Messrs. Jardine Skinner & Co., Agents, Kanknarrah Co., Ld. on the one hand, and Babu K. D. Shaha on the other, their principal.

On the 17th September Messrs. Jardine Skinner & Co., replied to Messrs. S N. Banerjee & Co.—

"We do not agree to accept your principal's name under this contract. The contract must, therefore, stand as originally made out." On the 29th September Messrs. Jardine Skinner called on Messrs. Banerjee & Co., to hand them documents for 250 bales, and on the 30th, Banerjee & Co., replied requesting them to ask the seller direct for the jute due under the contract. There was further correspondence but no delivery or payment was made, and ultimately Messrs. Banerjee & Co., received notice from the Registrar, Bengal Chamber of Commerce, that Messrs. Jardine Skinner & Co., had applied for arbitration. Messrs.

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Banerjee & Co., repudiated the jurisdiction of the Chamber of Commerce and the arbitrators appointed by it. The arbitrators, however, proceeded with the arbitration and made their award directing Messrs. Banerjee & Co., to pay Messrs. Jardine Skinner & Co., the sum of Rs. 4,593-12.

This is the award now impugned. Chitty, J. has dismissed the plaintiff's suit and from this judgment the present appeal has been preferred.

It is contended by the appellant that there was no contract between Messrs. S. N. Banerjee & Co. and Messrs Jardine Skinner & Co., or the Kanknarrah Co., Ld. that authorized the reference to arbitration.

The Kanknarrah Co., Ld. on the other hand maintain that the reference is justified by the clause providing for arbitration in the bought note. The arbitration clause contemplates two parties, each a party to the contract, and there can, I think, be no doubt those two parties are the sellers and the buyers.

Was then the plaintiff a party to the contract so as to be bound by the arbitration clause, was he a seller or buyer?

This question is not to be solved by describing the plaintiff as an agent with an undisclosed principal, and finding what the Contract Act says about a person in that predicament; that would be a superficial mode of investigation. We must find out what was the contract between the plaintiff on the one hand, and Messrs. Jardine Skinner & Co., as representing the Kanknarrah Co., Ld., on the other. For this purpose we must examine the bought note and also the surrounding circumstances, among them being the fact that a corresponding note was sent to Babu K. D. Shaha. The bought note is no doubt signed by the plaintiff, and *primâ facie* that would bind him, but it

would only bind him to that which is expressed in the document.

If the document be examined, it does not purport to be a sale by the plaintiff even as an agent: it is an intimation that Messrs. Jardine Skinner & Co.'s order has been carried out by a purchase made by the plaintiff on their account, not from himself but from someone else.

The note may be an admission of the plaintiff's employment by Messrs. Jardine Skinner & Co. to buy on their behalf, but the contract (if any) as between the plaintiff and them, which it evidences, is a contract not of sale but of employment.

This employment was to negotiate a sale and to be an intermediary, not to sell on behalf of another. The position is described by Jessel, M. R. in *Southwell* v. *Bowditch* (1) where he says, "Blackburn J. in a remarkably clear judgment says: 'there is no doubt at all in principle that a broker as such, merely dealing as broker and not as purchaser, makes a contract from the very nature of things between the buyer and the seller, and he is not himself either buyer or seller (the phrase 'the very nature of things' putting the fallacy of the court below in this case), and that consequently where the contract says 'sold to A B' or 'sold to my principals,' and the broker signs himself simply as broker, he does not make himself by that either purchaser or seller of the goods."

That a person signs simply as broker may be clear from the terms of the contract as well as from any statement to that effect appended to his signature, and this is illustrated by Mellish L. J., in the same case, where he says:

"Now there is, I think, a material difference between the words 'sold for you to my principals' and

(1) (1876) L. R. 1 C. P. 374, 378, 379.

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'bought of you for my principals.' The rule of law, no doubt, is that, if the principal is undisclosed, the broker saying bought of you for my principals' is liable; but this contract says 'sold for you to my principals,' *i.e.*, I, your broker, have made a contract for my principals, the buyers."

I have already pointed out that the note in this case is in the second of these two forms, and on its true construction I hold that the plaintiff was no more than an intermediary, and was not an agent for sale, to whom the provisions of section 230 of the Contract Act applies, so as to make him liable as an agent who has not disclosed his principal's name.

It has been contended before us that the present case is governed by *Gubboy* v. *Avetoom*(1). It is true that it was there held that the defendant in that case was an agent for an undisclosed principal within the meaning and operation of section 230. But to treat the construction placed on the document and circumstances under consideration in that case, as a decision binding us in this case, is to fly in the teeth of the doctrine propounded by Jessel M. R. in *Southwell* v. *Bowditch*(2), where he says: "There is no more vicious line of argument, if I may say so, with deference to the Court below, than that which was adopted by the Court below in this case of comparing one contract with another and saying it differs very little; you arrive ultimately at identifying wholly different contracts." And yet this is the way Mr. Avetoom would have us go. In a word, the Court there on the construction of the document before them came to the conclusion that a particular relation was established; this cannot bind us in our construction of a different document written under wholly different

(1) (1890) I L. R. 17 Calc. 449. (2) (1876) L. R. 1 C. P. 374, 377.

circumstances. I do not propose to discuss the competence of a suit like the present, for no objection on this score has been raised. Nor is it necessary to consider the plaintiff's claim to indemnity against K. D. Shaha. In my opinion the judgment of Chitty J. must be modified and a decree passed in the plaintiff's favour setting aside the award. The respondent Company must pay the plaintiff's costs of the suit and appeal, and the plaintiff must pay K. D. Shaha's costs of the suit and appeal.

WOODROFFE J. We must look at the terms of section 230 of the Contract Act. The first question is whether the appellant, who is a broker, is as such an agent. I think a broker is an agent. For what purpose he is an agent is another question. Primarily and for some purposes he is the agent of the party by whom he was originally employed. He is also generally the agent of each of the two parties for whom he negotiates. The engagement of a broker is like that of an ordinary agent, but with this difference, that the broker being employed by persons who have opposite interests, he is as it were agent for both the one and the other to negotiate the commerce or affair in which he concerns himself. Thus his agreement is twofold and consists in being faithful to all the parties in the execution of what each of them entrusts him with. A broker when he closes a negotiation as the common agent of both parties usually enters it in his business book and gives to each party a copy of the entry or a note or memorandum of the transaction which as given to the seller is the sold note, and as given to the buyer is the bought-note. *Primâ facie* a broker is employed to find a purchaser or seller and as such is a mere intermediary. He is thus an agent to find a contracting

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party, and as long as he adheres strictly to the position of broker, his contract is one of employment between him and the person who employs him and not a contract of purchase or sale with the party whom he in the course of such employment finds. A broker may however make himself a party to the contract of sale or purchase for he can go beyond his position of mere negotiator or agent to negotiate and by the terms of the contract make himself the agent of his principal to buy or sell. The section therefore refers to contracts "entered into by him on behalf of his principal." The next question is therefore, did the appellant enter into the contract in suit on behalf of his principal, that is, was he an agent to sell to the respondent or was he a mere negotiator to bring the parties together, but otherwise not concerned. If in this case the broker did enter into a contract, then I think on the facts he would be liable. For his principal was undisclosed at the date of the contract and the effect of the subsequent disclosure some three months later would not in itself affect the right of the respondents to proceed against the appellant though they might, if they chose, elect to proceed against the principal where disclosed. Whilst, however, I am of opinion that the appellant would be liable to the buyers if the case falls within section 230, the question is whether that section applies.

Primâ facie a broker does not make himself liable and upon the question whether he has entered into a contract or not we must look at the terms of the contract itself. Reference has been made to the fact that the appellant did not disclose his principal until three months later, and did not when Messrs. Jardine Skinner & Co. attempted to make him personally liable repudiate the liability then sought to be put upon him. He also appears to have billed the seller for

the difference. There is however a letter in which he refers Messrs. Jardine Skinner & Co. to the sellers, and the difference bill is headed "Kanknarrah Account." Subsequently personal liability was denied. It is not contended that these facts amount to acquiescence, estoppel, or constitute a new contract. So far as the contract in suit is concerned, we must look to the terms of the contract itself. I should have had no difficulty as to this had it not been for the case of *Gubboy* v. *Aveloom* (1), on which the respondent relies and which is very similar to the case before us, and which, (whether it has been rightly or wrongly decided) is, it is contended, binding on us. I felt some difficulty on this point during the hearing, but as the learned Chief Justice is of opinion that this case does not stand in our way and his decision is in accord with the natural justice of the case, I do not dissent from the order he would pass. I wish to note with reference to the observation that in Calcutta this would be regarded as a principal contract that there is no evidence of such usage before us.

J. C. *Appeal allowed.*

Attorney for the appellant: *K. K. De.*

Attorneys for the respondents: *Orr, Dignam & Co.* and *T. B. Roy.*

(1) (1890) I. L. R. 17 Calc. 449.

FULL BENCH.

Before Jenkins C.J., Woodroffe, Mookerjee, Holmwood and D. Chatterjee JJ.

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May 11.

BRIJNANDAN SINGH

v.

BIDYA PRASAD SINGH,

AND

BIDYA PRASAD SINGH

v.

BHUP NARAIN SINGH.*

Hindu Law—Mortgage—Mitakshara—Mortgage by father to secure personal debt—Neither antecedant, nor for family purposes, nor immoral—Suit brought after his death—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 120, 132.—Transfer of Property Act (IV of 1882), s. 85, Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1.

The Full Bench decision in the case of *Luchmun Dass* v. *Giridhur Chowdhry* (1) is still binding on this Court, as no contrary rule has yet been laid down by the Judicial Committee of the Privy Council [either in *Nanomi Babuasin* v. *Modhun Mohun* (2) or *Bhaghut Pershad* v. *Girja Koer* (3)] nor has it been superseded by subsequent legislation as s. 85 of the Transfer of Property Act (now replaced by O. XXXIV, r. 1 of the Civil Procedure Code, 1908) cannot touch the question.

Where a suit upon a mortgage effected by a father governed by the Mitakshara Law for a debt, which is neither antecedent nor for family purposes and not proved to be immoral, had been brought (more than six years) after the death of the father against the sons, some of whom were adult and some minors at the time of the mortgage :—

Held (without deciding when the right to sue accrues), that Art. 132 of the Schedule to the Indian Limitation Act had no application as there

* Reference to a Full Bench in Appeals from Appellate Decrees Nos. 617 and 769 of 1912.

(1) (1880) I. L. R. 5 Calc. 855.
(2) (1885) I. L. R. 13 Calc. 21 ; L. R. 13 I. A. 1.
(3) (1888) I. L. R. 15 Calc. 717 ; L. R. 15 I. A. 99.

was no charge on immovable property enforceable against the sons: consequently Art. 120 governed the case.

Luchmun Dass v. *Giridhur Chowdhry* (1) affirmed.

Kishun Pershad Chowdhry v *Tipan Pershad Singh* (2) approved.

Maheswar Dutt Tewari v. *Kishun Singh* (3), *Biswanath Pershad Mahata* v. *Jagdip Narain Singh* (4), *Sheo Narain Ray* v. *Mokshoda Das Mittra* (5) overruled.

REFERENCE TO FULL BENCH (in Second Appeal No. 617 of 1912 by Brijnandan Singh, the defendant; and in Second Appeal, No. 769 of 1912, by Bidya Prasad Singh, the plaintiff), by D. Chatterjee and Walmsley JJ.

The facts will appear from the Order of Reference which was as follows :—

D. CHATTERJEE J. "These two appeals arise out of one suit on two mortgage bonds executed by a father, who was the *karta* of a Hindu family governed by the *Mitakshara* Law and consisting of himself and his sons adult and minor. In both these documents he mortgaged what he called "all my rights" in certain mouzahs in which he and his sons jointly owned 2 annas 8 pies share, and in respect of which he was registered in the Collectorate as the owner of 5 annas-4 pies share (including the half share of his brother). The bonds were dated one in September 1901, and one in October 1901. The suits were brought on the 12th of August 1910. The mortgagee died in Aughan 1313=November 1905, and Hardeo Singh, the original mortgagor, died about 8 years before suit (according to the defendants), *i.e.*, about 1902.

The main questions in the case, so far as the appeals are concerned, are (*i*) whether the mortgagor mortgaged the whole share belonging to himself and his sons, or only his individual share as a member of the joint family; (*ii*) whether the claim or any portion of the same is barred by limitation.

The learned Subordinate Judge held that the mortgage was in respect of the individual share of the mortgagor and the suit was barred so far as it affected the share of the sons.

The plaintiffs appealed to the District Judge, who agreed with the First Court as to the construction of the bond of September 1901, but as to the bond of October 1901, held that the mortgagor intended to mortgage the whole share belonging to himself and his sons. It is not quite clear

(1) (1880) I. L. R. 5 Calc. 855.
(2) (1907) I. L. R. 34 Calc. 735.
(3) (1907) I. L. R. 34 Calc. 184.
(4) (1912) I. L. R. 40 Calc. 342; 17 C. W. N. 1025.
(5) (1913) 17 C. W. N. 1022.

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whether the defendants pressed their plea of limitation before him, but he evidently agreed with the First Court in this point.

There are two appeals before us, one by the plaintiff which is numbered 769 of 1912. This appeal is confined at the hearing to a claim to hold the entire 2 annas 8 pies liable under both the bonds : the other, which is by the defendants and numbered 617 of 1912, is on the plea mainly that the claim against the shares of the sons was barred.

As regards the construction of the two bonds, I am unable to find any real difference between the terms of the two documents. The words "*Hakiat milkiat dakli khud*" (= right and property which is my own) in the first document have been paraphrased in the second into "*Jo is wakt tak bela moshar kat ahde or bemodaklat digre bakabz-dakhal mon mokir rahta chala aya hai*" = which up to this time has been in my possession without any other person holding possession or share therein). If the mortgagor had been mortgaging his own individual share in the family property, he would have described the same as his *hissa* or share. I think the most reasonable construction would be to hold that he was mortgaging that of which he was in possession as the head of his own family, consisting of himself and his sons. The other construction would make the mortgage null and void as an alienation of an undivided share in a *Mitakshara* joint family estate, and it is not reasonable to hold that the mortgagor gave and the mortgagee took what could not be given and taken under the law.

On the second point, that of limitation, it has been contended that there is a considerable divergence of judicial opinion on the matter and there should be a reference to the Full Bench. In the case of *Surja Prasad* v. *Golab Chand* (1), Ghose and Harrington JJ., held on the authority of the Full Bench case of *Luchmun Dass* v. *Giridhur Chowdhry* (2), that when a *Mitakshara* father executes a mortgage for a debt which is neither antecedent nor immoral, the mortgage is not binding on the son, and a suit brought against the son after the death of the father more than 6 years after the due date, must be dismissed as barred by limitation. This case was dissented from by Brett and Sharfuddin, JJ., in the case of *Maheswar Dutt Tewari* v. *Kishun Singh* (3), the learned Judges holding that the Full Bench case had been virtually overruled by the Privy Council in the cases of *Nanomi Babuasin* v. *Modhun Mohun* (4), and *Bhagbut Prosad Singh* v. *Girja Koer* (5). Then in the case of *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (6), Mookerjee

(1) (1900) I. L. R. 27 Calc. 762.
(2) (1880) I. L. R. 5 Calc. 855.
(3) (1907) I. L. R. 34 Calc. 184.
(4) (1885) I. L. R. 13 Calc. 21.
(5) (1888) I. L. R. 15 Calc. 717.
(6) (1907) I. L. R. 34 Calc. 735.

and Holmwood, JJ. dissented from the case of *Maheswar Dutt* v. *Kishun Singh* (1), and refrained from making a reference to the Full Bench only because that was a case in which the suit had been brought within 6 years from the due date. This divergence of opinion came under judicial discussion in two recent cases. In the case of *Biswanath Pershad Mahata* v. *Jagdip Narain Singh* (2), Sir Lawrence Jenkins C.J., and N. R. Chatterjea J., held that the law as laid down by the Full Bench in the case of *Luchmun Dass* (3) had been practically altered by the provisions of section 85 of the Transfer of Property Act, and the later provisions of the Civil Procedure Code which were substituted for the same. In the subsequent case of *Sheo Narain Ray* v. *Mokshoda Das Mitra* (4), Coxe and N. R. Chatterjea, JJ., followed the above case. In the first of the latter two cases, however, the suit was brought in the lifetime of the mortgaging father, and in the second also some of the mortgagors were parties. These cases are, therefore, distinguishable from the present case in which the suit was brought more than 6 years after the death of the father and more than 6 years after the accrual of the cause of action. The debts are not antecedent debts: they are not proved to have been taken for the purpose of the family or spent for the benefit of the same, nor are they proved to be immoral. The father could not, therefore, make a valid mortgage of the interests of his sons. This can be fairly deduced from *Muddun Thakoor* v. *Kantoo Lal* (5), and *Suraj Bunsi Koer* v. *Sheo Persad Singh* (6). Then followed the Full Bench case in which the previous decisions of the Privy Council were discussed. Then came the cases of *Gunga Prosad* v. *Ajudhia Pershad* (7), *Khalilul Rahman* v. *Gobind Pershad* (8), and *Surja Prasad* v. *Golab Chand* (9), and these latter two cases were after the Privy Council cases relied on in *Maheswar Dutt's* (10) case as having overruled the Full Bench. With great respect for the learned Judge, I do not see how the particular phrase of the law laid down by the Full Bench was overruled by the cases of *Nanomi Babuasin* (11) and *Bhagbut Pershad* (12). The only other way in which the Full Bench is said to have been superseded is the passing of the Transfer of Property Act subsequent to it: with great respect for the learned Judges who hold the latter opinion, I cannot persuade myself

(1) (1907) I. L. R. 34 Calc. 184.
(2) (1912) I. L. R. 40 Calc. 342.
(3) (1880) I. L. R. 5 Calc. 855.
(4) (1913) 17 C. W. N. 1022.
(5) (1874) 14 B. L. R 187 ; L. R. 1 I. A. 333.
(6) (1879) I. L. R. 5 Calc. 148.
(7) (1881) I. L. R. 8 Calc. 131.
(8) (1892) I. L. R. 20 Calc. 328.
(9) (1900) I. L. R. 27 Calc. 762
(10) (1907) I. L. R. 34 Calc. 184.
(11) (1885) I. L. R. 13 Calc. 21.
(12) (1888) I. L. R. 15 Calc. 717.

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to believe that the Legislature intended to alter any provision of Hindu Law by Section 85 of the Transfer of Property Act, or the section of the Civil Procedure Code which now stands in its place. These are mere matters of procedure and could not have been intended to take away any vested rights. In any case the Full Bench made an effort to save the *Mitakshara* doctrine of equal rights of the father and the son from utter annihilation and was accepted as good law by a number of very learned Judges for a number of years; it is the last hope of the *Mitakshara* son and keeps up the last vestige of Vijnaneswar's cherished doctrine of equal rights, and I do not feel myself justified in holding that it has been taken away by implication, either by the Privy Council or by the Legislature, until there is an express and authoritative decision to that effect.

In view of the conflict of Judicial opinion above referred to, I would refer the following questions to the Full Bench :—

(i) Whether the decision of the Full Bench in the case of *Luchmun Dass* v. *Giridhur Chowdhry* (1) has been overruled by the Privy Council or superseded by subsequent legislation ?

(ii) Whether a suit upon a mortgage affected by a father governed by the *Mitakshara* Law for a debt which is neither antecedent nor for family purposes and not proved to be immoral, brought after the death of the father against the sons, some of whom were adult and some minors at the time of the mortgage, is governed by the 12 years' rule of limitation under Article 132 of the schedule to the Limitation Act so far as it claims to affect the shares of the sons ?

WALMSLEY J. I agree that there is such divergence of opinion expressed in the cases quoted that a reference is necessary.

ORDER :

Both the cases will be referred to the Full Bench."

Babu Provash Chandra Mitter (with *Babu Susil Madhab Mullick*,) for the defendants, appellants. It is only on the 2nd question, *viz.*, of limitation that the reference really arises, though the most important question on which the ultimate decision of the Full Bench will be based is whether the Full Bench decision in the case of *Luchmun Dass* (1) has been overruled by the Privy Council, or by subsequent legislation.

(1) (1880) I. L. R. 5 Calc. 855, 863.

[WOODROFFE J. How does the question of limitation arise on the findings ?]

Under the decision in *Luchmun Dass's* (1) case the son is bound to pay his father's debts as a pious duty, and this being an obligation the period of limitation would be six years from due date. It is not a suit on the mortgage, and in that view the plaintiff is entitled to a money decree. The same question arose in *Surja Prasad's Case* (2). *Gunga Prosad Case* (3) and *Khalilul Rahman Case* (4) decide that if the father is alive, then his interest will be affected under the equitable rule that the father could partition his share, and for the balance a money decree will be passed under which whatever property has been inherited by the sons would be sold. The decision of the Full Bench was that the mortgage itself upon which the money was raised could not be enforced, but the debt so contracted by the father being itself an antecedent debt, and the son being a party to the suit, the mortgagee would be entitled to a decree directing the debt to be raised out of the whole ancestral estate inclusive of the mortgaged property. I submit that the decision in *Moheswar Singh* (5) is wrong.

[*Babu Umakali Mukerjee*, for plaintiff-respondent, raised an objection as to the memorandum of appeal requiring amendment with the consequent payment of additional court-fees.]

The Privy Council decisions in *Nanomi Babuasin's* (6) and *Bhagbut Prosad's Cases*(7) did not introduce any new rule since *Girdharee Lal's Case* (8) and the Privy

(1) (1880) I. L. R. 5 Calc. 855, 863.
(2) (1900) I. L. R. 27 Calc. 762.
(3) (1881) I. L. R. 8 Calc. 131.
(4) (1892) I. L. R. 20 Calc. 328.
(5) (1907) I. L. R. 34 Calc. 184.
(6) (1885) I. L. R. 13 Calc. 21 ; L. R. 13 I. A. 1.
(7) (1888) I. L. R. 15 Calc. 717 ; L. R. 15 I. A. 99.
(8) (1874) 14 B. L. R. 187 ; L. R. 1 I. A. 321.

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Council has never carried the principle beyond a pious duty of son to pay off father's debts. The last case, *viz.*, *Kishun Pershad* v. *Tipan Pershad* (1) gives all the previous decisions. In the present suit the father is dead, but if he were alive he could be compelled to file a suit for partition under the equitable principle of doing what he is able to do [Mayne's Hindu Law, 8th edition, paragraph 364].

Under section 85 of the Transfer of Property Act (now Order XXXIV, rule 1 of the Code of Civil Procedure) being joint property the sons would have to be joined as parties.

[MOOKERJEE J. Would not section 43 of the old Code be an effective bar to a separate suit?]

If sons purport to mortgage their shares, then the position in the case of *Badri Prasad* v. *Madan Lal* (2) arises. It is merely a personal obligation arising out of a pious duty to pay father's debts.

[MOOKERJEE J. It would in fact be a personal decree against the sons limited to the extent of the ancestral property.]

Yes, and therefore there is no difficulty in drawing the decree. (In answer to JENKINS C.J.) Rule 6 of Order XXXIV of the Code corresponding to section 90 of the Transfer of Property Act) does not apply to sons, but may or may not apply to father. It may be looked at from two points of view. Though the creditor will ultimately succeed in obtaining the mortgage decree his real cause of action will be, not under the Hindu Law, but under an equitable relief, the Court compelling the father to sue for partition. Therefore no question will arise about the applicability of Order XXXIV, rule 6. It will be

(1) (1907) I. L. R. 34 Calc 735, 739 ; (2) (1893) I. L. R. 15 All. 75. 11 C. W. N. 613.

more in the nature of a charge to be worked out in a certain way.

[MOOKERJEE J. If it is a mortgage of his share that is beyond his ability, and so far as sons are concerned there is no question of section 90 of the Transfer of Property Act.]

There is no difficulty in having such a composite decree.

[JENKINS C.J. Suppose this suit had been brought within six years, would you still contend that this mortgage decree could not be passed?]

Yes, though there would not be any practical benefit to me—as my other property would be liable.

[MOOKERJEE J. So far as the father is concerned, when the money is not repaid by a certain date, the creditor is entitled to sell off the father's share, and similarly the creditor is entitled to sell the son's share, the grounds being quite distinct and the remedies quite separate in the two sets of cases—and time may run in one case for 12 years and in the other for 6 years from the same period.]

Yes. Take the case of a principal and a surety backing a promissory note. It may not be necessary to bring separate suits.

[D. CHATTERJEE J. Could it not be said that the inception of the debt by the father is the inception of the duty by the sons to pay?]

Yes. It is a joint Mitakshara family and hence the difficulty arises in the suing of father and son separately.

The minor son has the right of redemption in his father's suit. Under certain circumstances the persons mentioned in section 85 of the Transfer of Property Act are mortgagors.

[D. CHATTERJEE J. The making of the parties

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will depend on the view the plaintiff takes of his rights.]

Yes.

[HOLMWOOD J. According to your contention there cannot be a mortgage suit in such a case. It is a legal fiction.]

Yes.

[MOOKERJEE J. In *Surja Prasad's Case* (1), it appears that *Luchmun Dass' Case* (2) was not even cited. How can there be an equity of redemption unless you are bound to redeem ?]

Yes. If it is a mortgage suit, then 12 years' limitation applies; but if plaintiff is entitled to a smaller relief then a different limitation applies.

[MOOKERJEE J. It may be that the claim for a money decree is barred by limitation, whereas the mortgage suit would be in time within 12 years.]

A careful draftsman would make his plaint more comprehensive than here. Unless a contrary view has been taken by the Privy Council *Luchmun Dass' Case* (2) cannot be set aside as it has not been reversed by a Special Bench. [Comments on *Nanomi Babuasin's Case* (3) and *Bhagbut Prosad's Case* (4), and refers to *Kishun Pershad's Case* (5) regarding the questions whether or not debt was tainted by immorality and whether sons were necessary parties under section 85.] Section 85 could be applied for a double purpose, (i) to give the son a right to redeem even father's share and (ii) to prove facts that would entitle or disentitle plaintiff to get a mortgage decree.

In *Surja Prasad's Case* (6), the Court held that

(1) (1901) I. L. R. 28 Calc. 517, 586.
(2) (1880) I. L. R. 5 Calc. 855.
(3) 1885) I. L. R. 13 Calc. 21; L. R. 13 I. A. 1.
(4) (1888) I. L. R., 15 Calc. 717; L. R. 15 I. A. 99.
(5) (1907) I. L. R. 34 Calc. 735, 751; 11 C. W. N. 613.
(6) (1900) I. L. R. 27 Calc. 724.

section 85 applied because the debt was an antecedent one binding on the sons in any case. In the Privy Council case of *Sheo Shankar Ram* v. *Jaddo Kunwar*(1) the question arose whether a mortgage decree obtained in the presence of the managing member of a Hindu joint family was enough, or it was necessary under section 85 to have all the other members on the record.

If the plaintiff has notice of those who have an interest, they must be made parties.

I am now dealing with the second branch of my arguments, as I have finished with my first branch. In *Suraj Bunsi's Case*(2) stress is also laid on the fact that the joint ancestral property had *passed out* of the hand of the joint family. Therefore the general rule would only be extended in the case of sons where the debt was of a character that would bind the estate. [*Vide Gunga Prosad's Case*(3)]. *Girdharee Lal* v. *Kantoo Lal* (4) was a case of *antecedent* debt. Mr. Justice Pigot fully discusses its meaning in *Khalilul Rahman's Case*(5). [See also the Madras Full Bench decision in *Venkataramanaya* v. *Venkataramana Doss* (6).] The Judges in *Khalilul Rahman's Case* (5), I think, accept Sir Charles Sargent's decision in *Chintamanrav's Case* (7).

The debt must be antecedent to the transaction to make it binding thereon.

This takes us to the consideration of some principles of Hindu Law. Either it is a "*ready money*" debt or not. A ready money debt is a debt not for cash but incurred in payment of a previous debt. When

(1) (1914) I. L. R. 36 All. 383, 386 ; 18 C. W. N. 916.
(2) (1879) I. L. R. 5 Calc. 148, 171 ; L. R. 6 I. A. 88.
(3) (1881) I. L. R. 8 Calc. 131.
(4) (1874) L. R. 1 I. A. 321 ; 14 B. L. R. 187.
(5) (1892) I. L. R. 20 Calc. 328.
(6) (1905) I. L. R. 29 Mad. 200.
(7) (1889) I. L. R. 14 Bom. 320.

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a ready money debt is subsequently acknowledged, or any debt is incurred to pay it off, it becomes an "*antecedent*" debt, and a pious duty then arises for the son to pay off the first.

It is after due date that son's pious duty will commence. The Allahabad Full Bench in *Chandradeo's Case* (1) discusses the cases which accept the propositions laid down in *Luchmun Dass* (2). There the liability was of a personal nature and the limitation is of a personal nature too. I take my stand upon *Luchmun Dass' Case* (2), and *Chandradeo's Case* (1). The Madras Full Bench decision in *Venkataramanaya* v. *Venkataramana Doss* (3) supports my contention regarding the doctrine of Hindu Law.

[JENKINS C.J. We are really considering whether there is any Privy Council decision overruling the Full Bench in *Luchmun Dass* (2).

[JENKINS C.J. Supposing the sons cannot set up their rights; is not the creditor's remedy to bring the property to sale?]

Yes. See Mayne. [Golap Sastri's book has an exhaustive discussion.] See p. 35 last paragraph and also p. 36 of *Nanomi Babuasin* (4). The sons are concerned with the nature of the debt and the fact of the debt. For they can show it is a tainted debt they would not be bound as it would not then be their pious duty to pay.

[D. CHATTERJEE J. Do you think that limitation is the nature of their remedy or the rule of Court?]

On the nature of the remedy depends the question of limitation, as in the present case.

[HOLMWOOD J. Has the decision in *Khalilul*

(1) (1909) I. L. R. 31 All. 176, 207.
(2) (1880) I. L. R. 5 Calc. 855.
(3) (1905) I L. R 29 Mad. 200.
(4) (1885) I. L. R. 13 Calc. 21.

Rahman's Case (1) ever been dissented from except by Brett and Sharfuddin, JJ. in *Maheswar Dutt* (2) ?]

No.

[WOODROFFE J. So I take it that but for the decision in *Moheswar Dutt's* (2) case there would have been no reference to the Full Bench Is there any other decision of any other court supporting the view of Brett and Sharfuddin JJ. ?]

No, except perhaps Sargent C. J. in *Chintamanrav's Case* (3). I shall refer to the decision of Jenkins C.J. and N. R. Chatterjee J. in *Biswanath Pershad Mahata's Case* (4).

[MOOKERJEE J. In that case the question did not arise.]

There is a conflict between the decision of Ghose and Harrington, JJ. in *Surja Prasad's Case* (5) and that of Coxe and N. R. Chatterjea JJ. in *Sheo Narain Roy's Case* (6). As at page 1023 Coxe, J. refrains from expressing an opinion, this is the opinion of N. R. Chatterjea J. The original rule of Hindu Law is therein thrice distilled, as interpreted by the Judicial Committee of the Privy Council, and then taken by Westroppe C.J. and from that taken by N. R. Chatterjea J. who would have found in the texts of Hindu Law no such rule laid down.

[D. CHATTERJEE J. Does Westroppe C.J. say that father's debts are binding as mortgage ?]

If they are binding as debts, they are binding as debts only. The Hindu Law lays down that certain debts are binding on the sons who need not pay immoral debts, and they are under a pious duty to pay

(1) (1892) I. L. R. 20 Calc. 722.
(2) (1907) I. L. R. 34 Calc. 184 ; 11 C. W. N. 294.
(3) (1889) I. L. R. 14 Bom. 320.
(4) (1912) I. L. R. 40 Calc. 342 ; 17 C. W. N. 1025.
(5) (1900) I. L. R. 27 Calc. 762.
(6) (1913) 17 C. W. N. 1022.

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father's debts binding on them. Mr. Justice N. R. Chatterjea missed the entire reasoning of Mr. Justice Mookerjee in *Kishun Pershad's Case* (1) where their Lordships expressly reserved the question of limitation. In all the cases in which sons were joined as parties either under section 85 of the Transfer of Property Act or rule 1 of O. XXXIV of the Code, they were joined in a mortgage suit and that was on the allegation of the plaintiff; but in no case has it ever been laid down that the sons are necessary parties in the case of a mere money suit or decree. The last case is that of *Biswanath Pershad Mahata* (2) which assumes that the loan was expended on necessary family purposes.

Mr. B. Chakravarti (with him *Babu Umakali Mookerjee* and *Babu Akhoy Kumar Banerjee*), for the plaintiff respondent. The onus is on the sons as it is their pious duty to pay father's debt. [After summing up the previous rulings, refers to *Chandradeo* v. *Mata Prasad* (3) at page 208.] The nature of the debt and not of the estate or property is to be considered. Though great stress has been laid on the fact that in *Nanomi Babuasin's Case* (4) and *Bhagbut's Case* (5) the judgment of the Privy Council must be taken as confined to the case where the property had passed out of the hands of the family, there Lordships were really dealing with the question of alienation in the widest sense and not as confined to the facts of the particular alienation. The new principle laid down by the Privy Council is the remedy of following the property if debt is not tainted by immorality.

(1) (1907) I. L. R. 34 Calc. 735 ; 11 C. W. N. 613.
(2) (1912) I. L. R. 40 Calc. 342 ; 17 C. W. N. 1025.
(3) (1909) I. L. R. 31 All. 176, 208.
(4) (1885) I. L. R. 13 Calc. 21 ; L. R. 13 I. A. 1.
(5) (1888) I. L. R. 15 Calc. 717 ; L. R. 15 I. A. 99.

[MOOKERJEE J. The Full Bench in *Luchmun Dass* (1) explained the two earlier Privy Council decisions *Girdharee Lal's Case* (2) and *Suraj Bunsi's Case* (3).]

The two later Privy Council decisions make clearer what was laid down in the two earlier.

[MOOKERJEE J. Of course, if that Full Bench decision had not existed, then Mr. Mitter's argument would not have been well founded. We were bound by that Full Bench decision and are even now bound by it. There is no need to refer this matter to a Special Bench. There has never been a case before the Privy Council where the facts were the same as in *Luchmun Dass's* case (1).]

When the father is dead the creditor's remedy is a mortgage decree, as the land is affected by the mortgage. My submission is that in *Nanomi Babuasin's* case (4) Lord Hobhouse is considering the question when the whole family property is liable and when the father's share only. So he is considering the liability of the sons. If these are the creditor's remedies for debts, they are still debts for the realisation of which the creditor has to follow his remedies.

[JENKINS C.J. Yes (i) the liability of the estate, and (ii) the right of the sons to question that liability when proceedings have been taken against the father.]

Instead of getting into a discussion as to the meaning of the term antecedent debt, I prefer to come under the 2nd clause—the creditors remedy for his debts. I rely on *Girdharee Lal* v. *Kantoo Lal's* (2) and *Suraj Bunsi's Case* (3), the two previous Privy Council decisions where the proposition is the liability of the joint

(1) (1880) I. L. R. 5 Calc. 855.
(2) (1874) L. R. 1 I. A. 321, 333; 14 B. L. R. 187.
(3) (1879) I. L. R. 5 Calc. 148, 171; L. R. 6. I A. 88.
(4) (1885) I. L. R. 13 Calc. 21, 33; L. R. 13 I. A. 1.

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family estate under all circumstances and the liability of the father alone. Is the case of an unsecured creditor to be placed on a higher footing than a secured creditor? I would have thought that a secured creditor has a higher remedy because he has been more diligent in getting a higher security for his money: see *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* (1) reversing *Chidambara's Case* (2). I submit that in *Luchmun Dass's Case* (3) with regard to one particular, viz., the 3rd question, the answer given by the Full Bench is wrong (as the intricacies of the Mitakshara had not then been explained by the Privy Council) and this answer is inconsistent with the subsequent decisions of the Privy Council. Before the charge is declared undoubtedly it is a debt by the father. Does the son under pious duty to pay father's debt take subject to this charge? If I read rightly you can direct that the amount should be realized out of the ancestral estate only when there is an estate and it can be made liable; for if there is only a mortgage decree, the answer is the property cannot be made liable, but the decree can be paid out of the assets of the family like the case of taking an inheritance burdened with the payment of debts thereout, or does the Full Bench mean that it is a sort of incohate charge on the whole estate. I read it as a charge *intervivos*. It is absurd to say that though a Mitakshara father can bind the property still he can't create a charge in favour of the creditor. The principle I deduce from *Girdharee Lal* v. *Kantoo Lal* (4) is that the nature of the liability of the son does not depend on the nature of the estate, but of the debt. If I read the first answer of the Full Bench

(1) (1905) I. L. R. 29 Mad. 200.
(2) (1903) I. L. R. 27 Mad. 326.
(3) (1880) I.L.R. 5 Calc. 855, 857.
(4) (1874) L. R. 1 I. A. 321; 14 B. L. R. 187.

correctly a mortgage executed by the father, even though it be for an *antecedent* debt cannot be enforced on the basis of the mortgage, but it can be done in a suit in which the sons are party and the money decree obtained may be executed against the whole joint family property including the mortgage property which is not on a better footing. The ancestral property is liable because ancestral, but the mortgage *qua* mortgage is of no value. In *Suraj Bunsi's Case* (1) the word alienation is apparently used in the broader sense including mortgage. In *Nanomi Babuasin's Case* (2), the mortgage was usufructuary. The suit was against the father alone and the sale was upheld. According to Lord Hobhouse the sons can impeach not only the sale, but also the decree, by bringing a suit to show that the decree was not binding on them because of the nature of the debt.

Probably the immoral or illegal debts of the father would be taken into account. In *Khalilul Rahman's Case* (3), Mr. Justice Pigot possibly did not consider the question so far as the father's share is concerned according to the decision of Full Bench in *Luchmun Dass* (4) the sons are liable only if it be an antecedant debt, but according to the decision of Privy Council in *Nanomi Babuasin's Case* (2) it is that if the debt is not tainted the family property is liable, but sons may sue afterwards. So the Privy Council is wrong if the Full Bench is right.

But when property is sold under a mortgage decree it is binding on the sons according to the decision in *Bhagbut Prosad's Case* (5).

It cannot be. Alienation by a father is more

(1) (1879) I.L.R. 5 Calc. 148, 173 ; L. R. 6 I. A. 88.
(2) (1885) I.L.R. 13 Calc. 21, 33, 36; L. R. 13 I. A. 1.
(3) (1892) I. L. R. 20 Calc. 328.
(4) (1880) I. L. R. 5 Calc. 855, 857.
(5) (1888) I.L.R. 15 Calc. 717, 721, 754; L R. 15 I. A. 99.

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effective. The son's liability to pay the father's debt arises only so far that when the debt is not realised from the share of the father it is realised from the rest of the property as security. Otherwise you simply paralyse the joint family where there are infant sons and father. On the other hand if he borrows money without security the creditor can sell up the property if the debt is without taint. The expression "*antecedent*" debt is purely a creation first found in the judgment in *Suraj Bunsi's Case* (1) and as for "*ready money*" debt, I don't know what it means. A debt is a debt and does not become one only when the money is realised by the creditor.

[JENKINS C.J. A debt of ready-money character is, so says Sir Thomas Strange, one in which no credit is, or ought to be given.]

Luchmun Dass' Case (2) was apparently not cited before the Judges who decided *Suraj Prosad* v. *Golap Chand* (3). The son can be made a party only if he has a right to redeem, which he can have only, if he is a person affected by the mortgage. Before the transfer of Property Act a suit could be brought against a father by creditor to pursue the joint family property in the case of a debt, but after the passing of that Act the son has to be made a party as he has an interest.

[JENKINS C.J. Suppose the mortgagee brings a suit against the father (mortgagor) alone. Can the son demand to be made a party?]

If the Full Bench decision is right he can not. If the son afterwards wishes to attack the sale he would be met by the decision in *Bhagbut Prosad* v. *Girija Koer* (4).

(1) (1879) I. L. R. 5 Calc. 148; L. R. 6 I. A. 88.
(2) (1880) I.L.R. 5 Calc. 855.
(3) (1901) I.L.R. 28 Calc. 517.
(4) (1888) I. L. R. 15 Calc. 717; L. R. 15 I. A. 99.

In *Biswanath Pershad Mahata's Case* (1) the suit was instituted after six years from due date.

[JENKINS C.J. See section 53 of the Code.]

That does not contemplate a suit in the lifetime of the father.

Yes. It is a misnomer to call him a mortgagee; he is only a creditor. The father can sell the property the next day if there is no charge. The whole thing is an astonishing proposition and yet the Privy Council is supposed to have passed it knowing that it is opposed to the spirit of Hindu Law and Vijnaneswar's principles. On the other hand the texts in Mitakshara show that alienations either by sale or mortgage are placed on exactly the same footing.

So far as the Privy Council decisions are concerned, in terms the answer given by the Full Bench is wrong. Suppose the father executes an usufructuary mortgage and delivers possession. If it is nothing, I suppose next day he can walk into the property and tell the mortgagee to go out saying it was joint property and he had sons. For according to the Full Bench it is not a mortgage at all and is a personal obligation that does not affect the land.

[HOLMWOOD J. The Hindu Law gives you a greater security than under the law of mortgage, the whole family being under obligation to pay from the ancestral property.]

But suppose before the whole family can be proceeded against, they sell off everything amicably and retire to Hardwar ?

[WOODROFFE, J. We are not a Special Bench, and how can we say the Full Bench is wrong?]

If the decision of the Privy Council, the ultimate

(1) (1912) I. L. R. 40 Calc. 342 ; 17 C. W. N. 1025, W.

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Court of Appeal, is contrary to that of the Full Bench, then the Full Bench decision is gone.

[HOLMWOOD J. As I understand, you only want to get rid of the Full Bench decision so far as it says that the mortgage is not enforceable *qua* mortgage. Does the Privy Council say any where the mortgage is enforceable *qua* mortgage?]

Considering the importance of the question your Lordships can if there is any technical difficulty constitute a Special Bench to consider whether the Full Bench decision is good law in view of the later Privy Council decisions.

[WOODROFFE J. I think a Divisional Bench can refuse to follow a Full Bench of this Court on the ground that its decision has been overruled by a subsequent Privy Council decision.]

Yes. Sir Romesh Chunder Mitter did so in *Gunga Prasad* v. *Aiudhia Pershad* (1).

[JENKINS C. J. A Full Bench cannot overrule another Full Bench, but we can say that we follow a superior authority, viz., the Privy Council which has overruled the Full Bench as Mr. Justice Mookerjee tells me was done by the Full Bench in *Tepu Khan's Case* (2) with reference to the Full Bench case of *Gujju Lal* (3).]

In point of fact the Full Bench decision in *Luchmun Dass* v. *Giridhur Chowdhry* (4) is wrong and has been overruled by the Privy Council, and your Lordships are in no way bound by that Full Bench decision but by superior authority.

Regarding the question of limitation, in the first place so far as concerns any decisions, *Biswanath* v. *Jagdip Narain* (5) is exactly in point, while in

(1) (1881) I. L. R. 8 Calc. 131.
(2) (1898) I. L. R. 25 Calc. 522.
(3) (1880) I. L. R. 6 Calc. 171.
(4) (1880) I. L. R. 5 Calc. 855.
(5) (1912) I. L. R. 40 Calc. 342; 17 C. W. N. 1025.

Kishun Pershad v. *Tipan Pershad* (1) the Judges expressly refrained from passing any decision as to limitation. On the other hand there is the judgment of Ghose J. in *Surja Prasad* v. *Golab Chand* (2). Now if it is a liability of son to pay, when does this liability arise? Apparently all the authorities are agreed that the primary liability is the liability of the father, and his share is certainly liable whatever be the nature of the debt, and it seems to me to be the basis of that veiw—they look at it from this aspect that the son has a pious duty to save his father from a sin—an unliquidated debt, similar if I may say so to a claim made by a Hindu mother for maintenance or for a share when the sons are making a partition of joint property. Primarily the father is liable and if his share is sufficient his debt is paid. My submission is that unless and until the primary liability is exhausted the son is not called upon to pay, and the cause of action against him does not arise. For form of decree see *Kishun Pershad's Case* (1).

[JENKINS C.J. But the father was alive there.]

As was pointed out in *Suraj Bunsi's* case (3) if there was a liability to pay, it was a liability of the father to pay.

The only question is—when did this liability arise? Not till I pursue my claim; and if I realise my debt the son's liability does not arise.

[MOOKERJEE J. Do you say that the son may not be sued in the lifetime of his father?]

Yes, he may be sued—if I may use inapt language —as a surety, *i.e.*, so far as execution is concerned you are not required to proceed against him, as the primary liability is that of the father.

(1) (1907) I. L. R. 34 Calc. 735; 11 C. W. N. 613.

(2) (1900) I. L R. 27 Calc. 762.

(3) (1879) I. L. R. 5 Calc. 148; L. R. I. 6 A. 88.

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[MOOKERJEE J. Take an extreme case: can you sue the son in the lifetime of the father *without* suing the father?]

No.

[MOOKERJEE J. *Along with* the father? Is there a cause of action against him.?]

You may, as a surety. There is a cause of action as a surety—to avoid a multiplicity of suits. Undoubtedly after the father is sued and decree obtained and not fully realised, the son can be proceeded against.

[JENKINS C.J. Can you not do this: sue the father, attach his share; finding that insufficient, then attach the rest of the property including the son's share?]

Following the Full Bench apparently I can do it although sons are not on the record. I would never sue the son once I execute the decree against the property.

[HOLMWOOD J. Your remedy against the son must begin to run from father's death?]

By survivorship, I have no remedy except as against the son. In the present case I have not got any decree in any sense against the father as he is dead.

Regarding limitation, as no liability arises on the mortgage, but on the basis of the Full Bench case there is a *charge* on the immoveable property in the hands of the sons by operation of law, therefore I am strictly within the terms of article 132 of the Schedule of the Limitation Act to enforce payment of money charged upon immoveable property in their hands. To use the terms used by the Judges in the Full Bench case the creditor is entitled to a decree to be *realised* out of the joint family property in the hands of the son—call the decree a personal decree or anything else you like—but it cannot be pursued except out of

the family property in his hands, and not out of his personal property or against his person.

I rely on what was said by Lord Justice Bruce—"It is a *charge* upon the estate in the hands of the son." In that view it is immaterial whether the first part of my submissions is well founded or not, notwithstanding the contrary view in *Surja Prasad's Case* (1). But in *Kishun Pershad's Case* (2), Mookerjee and Holmwood JJ. left the matter open. The proper view of the Full Bench is that by operation of law the debt decree is to be realised as a charge.

[JENKINS C.J. If there is a decree sought to be executed against an executor who is liable to the extent of the property in his hands, no one would think of calling it a charge.]

If there is a *simple* debt not secured against the executor still the creditor does not get a higher right, because there the liability is created by law saying you get the property with a clog. Those are all my submissions.

[JENKINS C.J. We shall take time to consider our judgment and if we think necessary shall hear the appellant before delivering judgment.]

Cur. adv. vult.

The judgment of the Court (JENKINS C.J., WOODROFFE, MOOKERJEE, HOLMWOOD AND D. CHATTERJEE JJ.) was as follows:

The questions referred for decision to a Full Bench have been framed in these terms:

(i) Whether the decision of the Full Bench in the case of *Luchmun Dass* v. *Giridhur Chowdhry* (3) has

(1) (1900) I. L. R. 27 Calc. 762.
(2) (1907) I. L. R. 34 Calc. 735; 11 C. W. N. 613.
(3) (1880) I. L. R. 5 Calc. 855.

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been overruled by the Privy Council or superseded by subsequent legislation.

(ii) Whether a suit upon a mortgage effected by a father governed by the Mitakshara Law for a debt which is neither antecedent nor for family purposes and not proved to be immoral brought after the death of the father against the sons, some of whom were adult and some minors at the time of the mortgage, is governed by the twelve years' rule of limitation under Article 132 of the schedule to the Limitation Act so far as it claims to affect the share of the sons.

We have been invited by the plaintiffs respondents to answer the first branch of the first question in the affirmative; they rely upon the decision of the Judicial Committee in *Nanomi Babuasin* v. *Modhun Mohun* (1) and *Bhagbut Pershad* v. *Girja Koer* (2) in support of their contention. The Rules of the Court (Chapter V, Section 6) ordain that every decision of a Full Bench shall be treated as binding on all Division Courts and Judges sitting singly, upon any point of law or usage having the force of law, determined by the Full Bench, unless it is subsequently reversed by a Bench specially constituted consisting of such number of Judges as in each case shall have been fixed by the High Court, or unless a contrary rule be laid down by the Judicial Committee of the Privy Council. The decision in *Luchmun Dass* v. *Giridhur Chowdhry* (3) has not yet been reversed by a Special Bench. A Special Bench was constituted in the case of *Balaram* v. *Mangta Dass* (4) to consider the question: but the reference was disposed of on a preliminary ground. The only question then is, whether a contrary rule has been laid down by the Judicial Committee. The

(1) (1885) I. L. R. 13 Calc. 21; L. R. 13 I. A. 1.
(2) (1888) I. L. R. 15 Calc. 717; L. R. 15 I. A. 99.
(3) (1880) I. L. R. 5 Calc. 855.
(4) (1907) I. L. R. 34 Calc. 941.

two cases mentioned do not expressly lay down any contrary rule: they do not even mention the Full Bench decision which was not cited in argument before the Judicial Committee. It is said, however, that if the principles recognised in the two decisions of the Judicial Committee are logically developed, a result is reached which is contrary to the decision of the Full Bench. But it is important to observe that the decision of the Full Bench in *Luchmun Dass* v. *Giridhur* (1) was based upon an interpretation of the earlier decisions of the Judicial Committee in *Girdharee Lal* v. *Kantoo Lal* (2) and *Suraj Bunsi* v. *Sheo Persad* (3). The two later decisions of the Judicial Committee in *Nanomi Babuasin* v. *Modun Mohun* (4) and *Bhagbut* v. *Girja* (5), so far as the question now before us is concerned, do not extend, though they possibly elucidate, the rule enunciated in the earlier Privy Council decisions interpreted by the Full Bench. The decisions by the Judicial Committee on this subject have in a large measure affected the strict doctrines of the Mitakshara Law, and the question now before us is essentially, to quote the language of Sir James Colvile in *Lakshman Dada Naik* v. *Ram Chandra Dada Naik* (6) "not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences, as what are the limits of an exceptional doctrine established by modern jurisprudence." It is plain that the Full Bench decision is still binding on this Court, as no contrary rule has yet been laid down by the Judicial Committee of the Privy Council.

(1) (1880) I. L. R. 5 Calc. 855.
(2) (1874) L. R. 1 I. A. 321; 14 B. L. R. 187.
(3) (1879) L. R. 6 I. A. 88; I. L. R. 5 Calc. 148.
(4) (1885) L. R. 13 I. A. 1.
(5) (1888) L. R. 15 I. A. 99.
(6) (1880) I. L. R. 5 Bom. 48; L. R. 7 I. A. 181, 195.

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We have next been invited by the plaintiffs respondents to answer the second branch of the first question in the affirmative, on the ground that the Full Bench decision was superseded by section 85 of the Transfer of Property Act (now replaced by rule 1 of Order XXXIV of the Civil Procedure Code, 1908). In support of this contention, reliance has been placed upon the cases of *Biswanath Pershad Mahata* v. *Jagdip Narain Singh* (1) and *Sheo Narayan Ray* v. *Mokshoda Das Mittra* (2), the former of which was based on *Lala Suraj Prasad* v. *Golab Chand* (3). But, where in accordance with the ruling of the Full Bench in *Luchmun Dass* v. *Giridhur Chowdhry* (4) the mortgage is not operative as such against the sons, no question can arise as to the effect of section 85 of the Transfer of Property Act. The suit may have been framed as one to enforce the mortgage against the sons; but if, as laid down by the Full Bench, the mortgage as such is not enforcible against them, it is plain that section 85 cannot touch the question. Consequently, the decision of the Full Bench has not been superseded by subsequent legislation.

The first question, in each of its two branches, must be answered in the negative.

As regards the second question, it follows that article 132 of the Schedule to the Indian Limitation Act has no application, as there is no charge on immoveable property enforcible against the sons. Consequently, article 120 governs the case. The plaintiffs are thus entitled to sue within six years from the date when the right to sue accrues. Three alternatives have been suggested for this date: *first*, the date when the debt incurred by the father matures; *secondly*,

(1) (1912) I. L. R. 40 Calc. 342; 17 C. W. N. 1025. (2) (1913) 17 C. W. N. 1022. (3) (1901) I. L. R. 28 Calc. 517. (4) (1880) I. L. R. 5 Calc. 855.

the date when the creditor, after exhausting his remedies against the father, finds that the debt or a portion thereof is still unsatisfied; and, *thirdly*, the date of the death of the father. The first of these dates was accepted as the starting point in *Surja Prasad* v. *Golab Chand* (1); but the question does not require decision in the present case, as more than six years have elapsed from each of the three possible points of time mentioned. While, therefore, we hold that article 120 applies to cases of the description mentioned in the second question, we do not decide when the right to sue accrues for the purposes of that article. The second question is answered in the negative, and the rule of limitation applicable is held to be that embodied in article 120.

The result of this view is that appeal 617 of 1912 will be allowed with costs, both here and before the Division Bench; the suit will stand dismissed as against the appellants in respect of the bond of the 27th October, 1901, to which alone the appeal relates. The other appeal, 769 of 1912, will stand dismissed with costs, here and before the Division Bench. Each party will pay his own costs in both the Courts below. A self-contained decree, giving effect to these directions, will be drawn up in this Court in supersession of the decree of the Court below.

G. S.

In S. A. No. 617 of 1912, *Appeal allowed.*
In S. A. No. 769 of 1912, *Appeal dismissed.*

(1) (1900) I. L. R. 27 Calc. 762.

APPELLATE CRIMINAL.

Before Woodroffe, Beachcroft and Greaves JJ.

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March 24.

INDAR CHAND

v.

EMPEROR*.

Trading with the Enemy—Acts done and directions given before date of the Ordinance, relevancy of—Subsequent ratification—"Trading," meaning of—Directions to an agent to take delivery of goods lying in London, and to sell to German firm against payment—Supply of goods to agent and sale by him to German firm—"Destined," meaning of—Legal and actual destination—Goods shipped to enemy country before the war but taken up by English firm in London—Exportation of goods to accused's agent in Italy refused by such firm because of Royal Proclamation—Abetment of supply to, or of trading by the agent—Power of Appellate Court to alter conviction of principal offence to one of abetment—Discretion of Court—Commercial Intercourse with Enemies Ordinance (VI of 1914) s. 3—Trading with the Enemy Proclamation No. 2 cls. 5 (7), (9)—Royal Proclamation of 15th October 1914—Criminal Procedure Code (Act V of 1898) s. 423.

Where a case of mica was shipped by the accused to a German firm before the war but arrived in London after its outbreak and was taken up by an English firm, whereupon he wrote, before the date of the Ordinance VI of 1914, *viz.*, 14th October 1914, to a Bank in London, to make over the case to the English firm, and also to the latter to take it up and send the same to his agent at Genoa on application by such agent which, however, the English firm refused to do by reason of the prohibition of the export of mica to Italy by Royal Proclamation, and further wrote to the agent to apply to the English firm for the mica, and to deliver it to a German purchaser against payment, and where, after the date of the Ordinance, the accused again wrote to his agent informing him of his aforesaid letters and instructions to the Bank and the English firm, and directing the agent to apply for the case of mica to the latter and to

* Criminal Appeal No. 42 of 1915, and Government Appeal No. 2 of 1915, against the order of D. Swinhoe, Chief Presidency Magistrate, Calcutta, dated Jan. 4, 1915.

deliver it to the German purchaser against payment, which directions were not in fact carried out on account of the refusal by the English firm to export the mica to Italy :—

Held, that, as the Ordinance was not retrospective, the only acts and directions which the Court could take into consideration, to establish the offence of trading with the enemy, were such as were done or given after the date of its enactment, unless the previous acts and directions were ratified thereby.

Quære : Whether mere directions to an agent to apply for goods in the possession of a third person, and to deliver the same to an enemy against payment amount to "trading" within the meaning of the Trading with the Enemy Proclamation No. 2, cl. 5 (7).

The word "destined" when used with the term "trading," in the same sub-clause, means "intended for" and not "on the way to." *Legal* destination must not be confused with *actual* destination. The Court must determine whether the goods were actually destined for an enemy and with reference only to acts done and directions given after the date of the Ordinance VI of 1914.

If the English firm had really purchased the goods outright, they were not in existence, so far as any disposition of them by the accused was concerned, after the date they were taken up and paid for, and could not be destined for an enemy. But assuming that the said firm had merely taken over the goods on behalf of the accused and subject to his further instructions, a direction to the agent to apply for and deliver them to a German purchaser against payment was insufficient to give the goods an enemy destination in fact, as such direction had no operation on receipt thereof by reason of the refusal of the English firm to export the goods to the agent at Genoa.

Held, also, that, as the point was not free from doubt, the accused was entitled to the benefit of it.

It is not a universal rule that in no case can an Appellate Court convict an accused of abetment, when he was charged only with the principal offence. But it is discretionary with the Appellate Court to allow such fresh charge being tried on appeal. The Court refused, under the circumstances of the case, to alter the conviction to one of abetment of supply to, or of trading by, the agent.

Where the agent of the accused sold and delivered some cases of mica, and handed over the shipping documents for certain other cases lying in London, to a German firm or its agent in Genoa :—

Held, *per* BEACHCROFT AND GREAVES JJ., that the accused was guilty of the offence of supplying goods to the enemy within cl. 5 (7) of the Trading with the Enemy Ordinance No. 2.

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THE appellant, Indar Chand, was a member of the firm of Gunput Roy & Co. trading in piece and other goods at 12 and 13, Syed Sally's Lane in Calcutta, the other members being his father, Gunput Roy, and his two brothers, Kedarnath and Tunsook Roy. The mica branch of the business was under the sole control of Indar Chand. He was unacquainted with English, but the correspondence of the department was carried on by an English-speaking clerk, who used to read out and translate to him the letters received, and those written under his directions, in the course of the business. The firm had an agent at Genoa, named G. F. Checcacci, for the disposal of the mica and other goods sent from India, and used to trade largely with German and Austrian firms before the war.

Indar Chand was tried before the Chief Presidency Magistrate on the following three charges, each being in respect of a different transaction :—

(i) That you during September, October and November 1914, and during the continuance of a state of war . . . unlawfully did contravene the provisions of cl. 5 (7) of His Majesty's Proclamation of 9th September 1914 . . by trading in goods . . to wit, one case of mica shipment by s.s. "*Nore*" destined for an enemy country . . . and for enemies, to wit, certain persons trading . . . under the name and style of *Rheinische Glimmerwaren Fabrik* at Wiesling, Cologne . . . . and thereby committed an offence under s. 3 of . . Ordinance VI of 1914.

(ii) That you . . . unlawfully did contravene the provisions of cl. 5 (9) of the said . . . Proclamation, by entering into a commercial contract and obligation, to wit, a contract for the sale and supply of one case R. C. selected mica, with and for the benefit of enemies, to wit, certain persons trading . . under the name and style of *Rheinische* . . . and thereby committed an offence under s. 3 of . . . Ordinance VI of 1914.

(iii) That you during the months of September, October and November 1914 . . . unlawfully did contravene the provisions of cl. 5 (7) of the said . . Proclamation by supplying to a certain person F. Checcacci, . . certain goods . . . to wit, 11 cases of mica (previously shipped to Marseilles per s.s. "*Nevassa*" and "*Chybassa*") for and by way of transmission to an enemy country . . and to enemies, to wit, certain persons

trading . . . under name . . . of *Jaroslaw Erste Glimmerwaren Fabrik* at Berlin . . . and thereby traded in the said goods, destined for the said enemy country . . . and thereby committed an offence under s. 3 of . . . Ordinance VI of 1914.

First Charge. The facts relating to the first charge were that, on 30th June 1914, Gunput Roy & Co. under a previous contract with the *Rheinische Glimmerwaren Fabrik*, which carried on business at Weisling in the German Empire, shipped a case of mica *per* P. & O. s.s. "*Nore*" from Calcutta to Cologne *viâ* Antwerp, consigned to the above German firm. On the 21st July, a bill was drawn and endorsed by the appellant's firm on the *Bergische Kalkische* Bank of Cologne for £21 to the order of the National Bank, London, and presented with the bill of lading at the Calcutta branch of the latter. The draft was discounted and all the documents were transmitted to the head office in London.

War was declared by His Majesty against the German Empire on the 4th August, and proclaimed in India, on the next day, by the Governor-General (see *Gazette of India, Extraordinary*, 5th August, Part I, p. 1294). On the 5th August, a Royal Proclamation was issued prohibiting trading with the enemy, but it was revoked and superseded by the Trading with the Enemy Proclamation No. 2, issued on 9th September and republished in India by Notification No. 419 W. dated 31st October 1914 (see *Gazette of India*, Part I, p. 1743). On the arrival of the "*Nore*" at London, the P. & O. Steamship Co. notified to Gunput Roy & Co. that the vessel would not proceed to Antwerp, and that the case of mica had been landed. Information was also received from the National Bank in Calcutta, on 21st September, that the drawees had refused to honour the bill, whereupon the appellant wrote the next day to the manager of the said Bank here

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requesting him to instruct the London office to take delivery of the mica and make it over to Baker and Startin, an English firm, whom, he alleged, he was instructing to take over the same. Meanwhile Checcacci had written to Gunput Roy & Co. a letter dated the 20th August, received in Calcutta on or before the 24th September, the terms of which were as follows :—

Rheinische write they are ready to pay for the draft of £21, but on receipt of goods and not before....My advice is that you give instructions to the Bank to have all those goods sent to me at Genoa.

In reply to the above Gunput Roy & Co. advised Checcacci by letter, dated the 24th September, which reached Genoa on the 21st October, as follows :—

We have instructed the Bank to deliver that case (per s.s. "*Nore*") to Baker and Startin whom we have also instructed to take delivery of the same from the Bank. If you wish to receive the case, please ask Baker and Startin to send you the case. We are also writing them to deliver you the case if you apply to them. Please do not give the case to *Rheinische* without payment.

On the same date Gunput Roy & Co. wrote to Baker and Startin instructing them in the above sense, and the reply of the latter, dated the 23rd October, acknowledged receipt of the same. On the 9th September, Checcacci wrote to the appellant's firm : "Also from *Rheinische* I have got inquiries. I have written to all German firms." In reply the appellant's firm wrote, on the 8th October, the following letter, which reached Genoa on the 12th November—

We strongly recommend you not to sell to German buyers.

P.S.—You may sell to German buyers if the British Government do not take any offence or be contrary to their law or London people are still selling.

On the 16th September, Checcacci wrote to the appellant's firm that *Rheinische* required the mica per s.s. "*Nore*" to be shipped to Rotterdam. The letter was received here on the 13th October.

Ordinance VI of 1914 was published in the *Gazette of India, Extraordinary*, and came into force on the

14th October. It was re-published in the *Calcutta Gazette, Extraordinary*, on 20th October. A Royal Proclamation was issued on the 15th October prohibiting the export of mica, except to the ports of France, Russia (other than the Baltic Ports), Belgium, Spain and Portugal. (*See* Manual of Emergency Legislation, p. 407.) This Proclamation appears to have been superseded by the one of 10th November published in the *Gazette of India* of 12th December, Part I, p. 2072.

Gunput Roy & Co. replied to Checcacci's letter of 16th September on 15th October by a letter, which reached the latter on or before the 12th November, as follows :—

> In our letter of 24th last we have already advised you that we have instructed the Bank to deliver that case to Baker and Startin against payment, whom we have also instructed to deliver you the case if you apply to them. We hope you have done the needful before receipt of this, but do not deliver to *Rheinische* without payment....We are badly in need of money at present.

On the 22nd October Gunput Roy & Co. wrote further, as below, in reply to Checcacci's letter of the 23rd September which reached here on 20th October:—

> We have instructed Baker and Startin to deliver you that one case as we have paid the amount to Bank. Please receive that case from them and deliver to *Rheinische* against payment and remit us the money. Try to sell promptly and remit the money as we are badly in need of it at present.

In answer to a letter of Checcacci's dated the 30th September, received here on the 27th October, that *Rheinische* wanted the mica shipped per s.s. "*Nore*," the appellant's firm replied as follows, on the 29th October :—

> We have already instructed the Bank to deliver that case to Baker and Startin, whom we have written to, on 24th September last, to pay and take delivery of the same from the Bank and deliver the case to you if you ask them. Please ask them to send that case to you and deliver to *Rheinische* against payment. We hoped you would have done the needful in the meantime....We are badly in need of money.

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In the meantime Checcacci, on receipt of Gunput Roy & Co.'s letter of 24th September, wrote on 21st October "I shall certainly not ask Baker and Startin to deliver that case to me," though he altered his mind and wrote, on the 12th November, promising to enquire whether Baker and Startin had taken delivery. On the 5th November Gunput Roy wrote to Checcacci—

> We hoped you would have applied to Baker and Startin to deliver you the case whom we have instructed to deliver you on taking from the Bank, and by this time you would have done the needful and realized the money. . . . We have been put into great difficulty in financial matters.

On the 19th November Checcacci wrote that Baker and Startin would not be able to deliver him the goods as they could not be exported from England just then. Gunput Roy & Company's letters of 29th October and 5th November and also those of Checcacci, dated 21st October, 12th and 19th November, were intercepted in transit and detained by the Press Censor. Three other letters not given in evidence at the trial were referred to on appeal (i) a letter from Baker and Startin to Gunput Roy & Co. dated 23rd October, "Received yours of 24th ultimo. We are taking up this case and will do our best to dispose of it at invoice rates. We could not deliver to Checcacci as export of mica to Italy is prohibited," (ii) a letter by the National Bank, Calcutta, on 17th November, to Gunput Roy & Co. stating the receipt of advice from the London office as to the release given to Baker and Startin for the case of mica, (iii) a letter from the National Bank here, dated 14th December, advising the delivery of the documents to, and payment of the bill by, the said firm. There was, however, no definite evidence when this firm received or disposed of the mica and whether on their own account or as agent of Gunput Roy & Co.

Second Charge. On 23rd September Checcacci wrote to Gunput Roy & Co. enclosing an order from the *Rheinische* "of R. C. mica selected to cut $4\frac{1}{4} \times 4\frac{3}{4}$ of first class quality." The appellant's firm replied, on the 22nd October, agreeing to ship the same, but adding that "the quality would be no better than what we are accustomed to ship." Checcacci wrote in answer, on the 19th November, to hurry up the shipment. The Magistrate held that no completed contract had been entered into, and acquitted the appellant of this charge, and the Crown withdrew its appeal at the hearing before Beachcroft and Greaves JJ.

Third Charge. On the 16th July 1914, Gunput Roy & Co. shipped for Marseilles eight cases of mica by the s.s. "*Chybassa*" consigned to Drouet & Co., in Paris, and six by s.s. "*Nevassa*" intended in equal numbers for Drouet and the *Manufacture Parisienne.* The former cases reached Marseilles, but the others were carried to London after the outbreak of war. On the 20th August Checcacci informed Gunput Roy by letter that the French consignees had not taken delivery, and requested directions to the Bank to send the goods with the shipping documents to him at Genoa for disposal. The appellant replied, on the 24th September, that he had directed the Bank to deliver him the goods free. On the 16th September Checcacci wrote to the appellant's firm that Jaroslaw of the firm of *Erste Glimmerwaren Fabrik* having its head office in Berlin, had telegraphed to him agreeing to take the goods at Genoa, and advising directions to the Bank to send the shipping documents to him there. The appellant's reply of the 15th October stated that he had done so. On the 23rd September, Checcacci again wrote that Jaroslaw wanted to buy the goods, and suggested free delivery to him of the documents. The appellant wrote, on the 22nd October, to Checcacci accepting the

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proposal and directing him to sell at profitable prices. On 7th October, Checcacci informed Gunput Roy & Co. that he had received the documents for the six cases by s.s. "*Nevassa*" lying in London and sold them to Jaroslaw, payment at Genoa against delivery. This letter was answered by the appellant on the 29th October. On the 14th October, Checcacci acknowledged receipt of the documents for the eight cases and intimated that he had sold all the goods consigned to Marseilles less three cases *per* s.s. "*Nevassa*" which Drouet wanted. On the 21st October, Checcacci wrote that the Marseilles goods had not reached him, but that 11 cases had been sold to Jaroslaw. The appellant replied, on the 29th October to Checcacci's letters of 30th September and 7th October, stating that he hoped that the latter had brought the cases to Genoa and would sell them, and adding "We note you have sold those six cases at invoice prices to Jaroslaw. Please sell the eight cases at higher prices." The correspondence between Checcacci and the appellant in the course of transit after the 21st October was detained by the Censor. Checcacci delivered the documents for the eight cases shipped by s.s. "*Chybassa*" to Jaroslaw's agent on 8th October, forwarded those relating to the three cases *per* s.s. "*Nevassa*" to Jaroslaw on the 10th, and sent the invoices for the 11 cases on the 12th. The eight cases were delivered to the agent between the 20th October and the 12th November. On the 12th November Checcacci, in reply to the appellant's letters of the 8th and 15th October, wrote that he had shipped the eight cases to the "*Jaros Mica Company*" and had received a cheque, and added that if he got the three cases from London, he would deliver them also to this "American Company."

The Magistrate convicted Indar Chand, on the 4th January 1915, upon the 1st and 3rd charges, and

sentenced him to concurrent terms of rigorous imprisonment for 18 months on each charge and added a of fine Rs. 1,000 on the latter charge only. He acquitted the accused on the second charge. The accused appealed against his conviction on the first and third charges, and the Government against his acquittal on the second.

Sir S. P. Sinha (with him *Mr. C. C. Ghose*, *Mr. B. N. Bose* and *Babu Manmatha Nath Mookerjee*), for the appellant.

The Advocate-General (*Mr. G. H. B. Kenrick, K.C.*) (with him *Mr. H. G. Pearson* and *Babu Manindra Nath Banerjee*), for the Crown.

BEACHCROFT AND GREAVES JJ. passed the following judgments convicting the appellant on the third charge, but disagreeing on the first:—

BEACHCROFT J. The appellant has been convicted on two charges under section 3 of Ordinance No. VI of 1914 for having contravened the provisions of section 5 (7) of the Royal Proclamation of the 9th September relating to Trading with the Enemy. He was tried on three charges, but acquitted on the second. The first charge was to the effect that he had traded in a case of mica destined for a German firm in Germany, and the third was to the effect that he had supplied to one Checcacci of Genoa 11 cases of mica for and by way of transmission to a certain firm in Germany, and thereby traded in the said goods destined for the said enemy country and the said enemies. The Magistrate convicted the appellant on both charges of trading in goods destined for the enemy, and sentenced him to rigorous imprisonment for 18 months on each charge, the sentences to run concurrently, and also to a fine of Rs. 1,000 on the third charge.

The facts are not in dispute. The appellant is a member of a firm in Calcutta and was in charge of the mica business of the firm. The firm had an agent, named Checcacci, in Genoa, who was apparently their sole agent in Europe. Before the outbreak of the war the appellant had shipped a case of mica *per* s.s. "*Nore*" to a German firm, trading under the name of *Rheinische Glimmerwaren Fabrik* at Cologne *viâ* Antwerp. Owing to the outbreak of war the ship did not proceed beyond London. On the 20th August Checcacci wrote to the accused that the German firm,

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whom for brevity I shall call the *Rheinische Co.* would pay for the case of mica on receipt of the goods. The accused then communicated with a London firm, Messrs. Baker and Startin, who had been buyers of mica from accused's firm, asking them to take delivery of the case from the London branch of the National Bank of India, and at the same time asked the National Bank in Calcutta to instruct their London branch to deliver the case to Baker and Startin. This was done, and the mica came into the hands of Baker and Startin. Apparently it never again came directly into the hands of the accused or Checcacci, for the Magistrate states in his judgment that Baker and Startin sold it. He does not, however, say when Baker and Startin received it, nor when they disposed of it, and we have not been referred to any evidence on the point.

The prosecution relies on certain correspondence between the accused and Checcacci to establish the fact that negotiations went on between the *Rheinische Co.* and Checcacci on behalf of and with the authority of the accused, and that attempts were made to get the mica to Checcacci at Genoa to be forwarded to the *Rheinische Co.*

It will not be necessary to quote the correspondence in detail. A short reference to the various letters will be quite sufficient to indicate the position of the parties. In dealing with the correspondence it must be remembered that postal arrangements were so dislocated that we generally find answers dated about a month later than the letters to which they are replies.

On the 20th August, Checcacci wrote to accused that the *Rheinische Co.* would pay for the mica on receipt of the goods. The accused replied, on the 24th September, that he had instructed the Bank to deliver the mica to Baker and Startin, that if Checcacci wanted the mica he should apply to Baker and Startin, whom the accused was instructing to deliver it to Checcacci, but Checcacci must not give it to the *Rheinische Co.* without payment. On the 9th September Checcacci wrote that the *Rheinische Co.*, in common with other German firms, was enquiring for mica. He mentioned the arrival of s.s. "*Nore*" in London. In the answer, on the 8th October, the accused stated that he had already told Checcacci of the arrangements in connection with the mica on the "*Nore*". He recommended him not to sell to German buyers, but in a postscript added that he might sell to German buyers, if the Government did not mind or it was not illegal or if London people were selling. On the 16th September, Checcacci wrote that the *Rheinische Co.* wanted the case of mica sent to Rotterdam, but that he himself wanted it at Genoa. Replying on the 15th October, accused referred to the information given in his letter of 24th September, adding that he hoped Checcacci had done the needful, which apparently means had applied to Baker and Startin, and repeated

his injunction not to deliver without payment. On the 22nd October in answer to a letter referring to offers by German firms, accused repeated his information about telling Baker and Startin to deliver the case of mica and again told Checcacci to deliver it against payment. These instructions were again given in a letter of the 29th October, but this letter being detained by the Censor never reached Checcacci. In a later letter of 5th November accused expressed the hope that Checcacci had applied to Baker and Startin, that he had done the needful, which evidently means sold the mica and sent on the money This letter was stopped by the Censor.

This is as much as is material to the first charge, though the matter was referred to in two other letters of Checcacci, one of 21st October, in which he showed his displeasure at accused having mixed up Baker and Startin in the matter, and refused to ask for the case, and another of 12th November, in which he promised to enquire of Baker and Startin, who had never said a word.

The Magistrate has found that with the full authority of the accused Checcacci had entered into an arrangement with the *Rheinische Co.* under which the case was to be transferred to the *Rheinische Co.* which was to pay for it and was awaiting its arrival, and that the arrangement was sufficiently completed to justify the inference that but for the difficulty of exporting the mica from England it would have been delivered to the enemy. He found that the acts of the accused and his agent constituted trading in goods destined for the enemy. To his *resumé* of the facts established, he might have added this that the accused had done all in his power to enable the goods to be sent to Genoa.

It is argued for the appellant that the facts found by the Magistrate do not justify the conviction. It is contended in the first place that, as all the other acts specified in section 5 (7) imply handling of goods, the term "trade" in the same section involves handling, and the offence of trading is not complete without it. I cannot accept this contention. This is not one of those cases where the words used to define the offence are more or less synonymous and relate practically to the same or similar acts. The section contemplates four sets of acts which are entirely separate, the one from the other

All commerce is presumed to be for the benefit of the country which is a party to it, whether the country is paying for goods received or is receiving payment for goods supplied. And as commerce is presumed to be advantageous to an enemy country, the object of the Proclamation is to prevent the enemy receiving assistance by way of commerce. Section 5 (7) is designed to strike at that commerce by making penal certain operations of commercial intercourse, and has in view not only direct, but also indirect means of supply. When analysed the section will be found

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to contemplate four distinct acts, any one of which may form, closely or remotely, part of the process of supply to an enemy or receipt from an enemy. The first is supply to or receipt from the enemy himself, the second is supply to an intermediary for transmission to the enemy, or receipt from an intermediary by way of transmission from the enemy, the third is the dealing in goods which are to be sent to the enemy or which have come from the enemy, the fourth is the carrying of goods to the enemy or from him. The third is the case under discussion.

The terms are wide enough to include trading between persons, neither of whom is an enemy, if the goods are intended to be sent to an enemy, and also the case where one of the parties trading is an enemy. In the latter case if the trading comprises an actual supply of goods, the offence would also fall within the first clause.

It will be noticed that there are two essentials requisite to complete the offence, (i), a trading, (ii) in goods destined for an enemy. What is trading? There was considerable discussion at the Bar as to the meaning of the term, and reference was made to various decisions on Prize Law to support the proposition that actual handling of goods was essential. I do not propose to refer to these authorities, for decisions on Prize Law must in the very nature of things relate to instances of handling of goods. I take to be included in the term "trading" any commercial transaction between parties which has for its object the transfer of goods by purchase, sale, barter or exchange. I do not consider it necessary that goods should in fact pass. A man who takes a cargo of beads or bangles and offers them for sale to South Sea Islanders trades in those goods, even though he may not succeed in selling a single article. Language must keep pace with changes in the actual conditions of life. And with improvements in communications and development of commerce many kinds of goods become the subject of trading even before they actually come into existence. The term "trading" cannot be limited to cases where one of the parties is actually in physical possession of the goods.

Now what are the facts? The accused had had dealings with the *Rheinische Co.* before the outbreak of the war. After the outbreak of war, his agent Checcacci is in communication in respect of the case of mica with the *Rheinische Co.*, which offers to pay on receipt of the goods. The accused writes to Baker and Startin to send the goods to Checcacci, and writes to the latter to get the goods from Baker and Startin and to deliver them to the *Rheinische Co.*, on payment. We do not know the exact understanding on which Baker and Startin paid for the goods. They were old customers of accused, and it may be that the accused wanted them to oblige him by purchasing the goods or that he merely wanted them to get the goods from the Bank and hold them at his disposal. We have only one

letter which passed between the two firms, the letter of the 23rd October from Baker and Startin to accused's firm, and this letter to my mind supports the latter conclusion. Baker and Startin write, "We are taking up this case as requested by you and will do our best to dispose of it at invoice rates." If Baker and Startin were purchasers of the mica, it would be a matter of no concern to the accused at what price they disposed of it. Also they point out that it will be impossible to send the mica to Checcacci. Then referring to some other goods which presumably accused had also asked them to pay for they say, "We await details before deciding if we can pay for them. It is understood of course that we can dispose of any such goods in order to release our money as quickly as possible." I read the whole letter as an agreement to temporarily accommodate accused, by paying the Bank, getting delivery of the goods and disposing of them, for accused. The accused also evidently thought the mica was at his disposal when he instructed Baker and Startin to send it to Checcacci. In fact Baker and Startin disposed of the mica. I do not know when, nor whether on their own account or on account of accused. They could not have got it before the 23rd October, and the letter of the 14th December from the National Bank, Calcutta, to accused suggests that they did not even get the documents before November, allowing six weeks for communication of that fact to pass from the Bank in London to the Calcutta branch and from the latter to accused.

But whatever may have been the position of Baker and Startin, does the mere accident that accused could not actually get the goods to Checcacci alter the fact that he was trading in them? I think not. He offered to an enemy firm goods which he thought he was in a position to send to them, and he did all that lay in his power, to get the goods to them. This to my mind was clearly trading.

Now I come to the second essential of the offence. It is argued that the mica does not come within the description of goods "destined for an enemy," for when originally consigned to the *Rheinische Co.* that firm was not an enemy, and when the mica was taken by Baker and Startin in London its destination was no longer Germany. This argument is based on what is to my mind a misinterpretation of the meaning of the words "destined for an enemy." That phrase cannot refer to the destination before the trading takes place, but to what will be the destination as the result of the trading, or after it takes place. An example will show that it must be so. Suppose *A* ships a quantity of goods for Germany in the care of an agent *B*. On the way *B* sells the goods to *C* who diverts them to England. Here the goods are in the first instance destined for Germany, they are so destined at the time that *B* and *C* trade in them, but *B* and *C* obviously do not commit an offence against the Proclamation for they in effect carry

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out its object by preventing the goods from reaching the enemy country. But if *A* sells to *B* goods, which he knows *B* intends to send to Germany *A* and *B* both commit an offence against the Proclamation, for they trade in goods which are intended for, for that is all that "destined for" means, an enemy country. In this case the accused in trading in the goods intended that they should go to Germany and the purchasing company intended the same The offence of the accused is, therefore, in my opinion complete.

He is also, on the facts established, guilty under section 3 of the Ordinance for another reason in that he abetted the supply of goods to an enemy. It was suggested in the course of argument that even if he was not guilty of trading in goods destined for the enemy he was guilty of such abetment. Learned counsel's answer was that though instigation to sell to an enemy would be an abetment yet, as the proposal in this case came to accused from Checcacci, the accused could not be said to have abetted supply by his agent. The argument is ingenious but fallacious. Instigation is not limited to the person from whom the proposal first moves. In his letters both of 22nd October and 29th October the accused directed Checcacci to deliver the goods to the *Rheinische Co.* against payment. The last mentioned letter not having reached Checcacci would not be an instigation, but the letter of 22nd October was. It was not, as suggested, merely a case of acquiescence but of positive direction.

Even if the charge as framed failed I should, therefore, be prepared to convict accused of abetment of supplying goods to the enemy. It was not suggested that he would be in any way prejudiced by the absence of a charge of abetment. The case depends entirely on the correspondence, and it has been reiterated on behalf of the accused that he has in every way assisted the prosecution by putting at the disposal of the Crown the whole of his correspondence.

The mica which forms the subject matter of the third charge had also been shipped from India before the war broke out. Fourteen cases of mica had been shipped to Marseilles ; eight cases by s.s. "*Chybassa*," for one Drouet of Paris, and six cases by ss. "*Nevassa*," three for Drouet and three for the *Manufacture Parisienne*. The former consignment was landed at Marseilles, but the latter was sent on by mistake to London. The consignees were unable to take delivery, and the accused, having been advised of this by the Bank, wrote to Checcacci, on the 17th September to try and get the goods and reship them to him. On the 24th September having in the meanwhile received a letter from Checcacci, dated 20th August reporting what he had already learned from the Bank, accused wrote that he had instructed the Bank to deliver to Checcacci. Letters from Checcacci of the 7th and 10th September speak of a growing demand both in

Germany and elsewhere for mica, and Checcacci advised accused to have a stock of mica at Genoa. In answer to the first letter accused wrote the letter of the 8th October, to which I have already referred, advising Checcacci not to sell to Germans, subject to the qualification mentioned in the postcript. Then on the 16th September Checcacci wrote that Jaroslaw had telegraphed to have the mica which had been consigned to Drouet and the *Manufacture Parisienne* sent to Genoa, and he asked accused to tell the Bank to make over the documents to him, on which he would dispose of the goods.

The firm of Jaroslaw's *Erste Glimmerwaren Fabrik* was an old customer of accused, with its head office in Berlin. From the terms of Checcacci's letter it would appear that he had been in communication with Jaroslaw about this particular consignment of mica. Accused answered this letter on 15th October saying that he had told the Bank to deliver the documents. He says " We trust you would have received the same from them and brought those cases to Genoa. Please try your best to sell them elsewhere and remit us the amount." It is suggested for the appellant that the word " elsewhere ", in view of the previous letter of the 8th October, means to some persons other than Germans. I think there can be no doubt that it means elsewhere than to the original consignees. Accused obviously does not mean to exclude Germans, for in the same letter he is consenting to the sale to the *Rheinische Co.* What he said in his letter of the following week is very clear. Checcacci had written on the 23rd September, " Jaroslaw . . . . . wish to buy the R. C. 1. 2 & 3 lying at Marseilles . . . . Please instruct the Bank to deliver me free the documents for these goods. I shall have them sent to Genoa and will sell them from here. I cannot sell them from Marseilles, as buyers are Jaroslaw or Brandt or others whom the English Banks will not accept drafts upon . . . . . ." Then he refers to an offer by the *Rheinische Co.* and an Austrian merchant, and says " there are no stocks on the Continent, if we are clever we shall gather all the trade of the Continent in our hands for now and for the future, but we must act quick and in earnest." Accused's reply was an acceptance of the proposal and a direction to sell at profitable prices. He wrote " We have already paid the money which the Bank advanced to us and instructed the Bank to deliver those documents to you free by cable, which we trust on receipt of that cable they have delivered those documents to you and you have brought those cases to Genoa. Please try to sell them promptly at profitable prices." On the 30th September, Checcacci, who of course did not receive any of accused's instructions, even in answer to his earliest letters, till a latter date, again wrote that Jaroslaw wanted the goods. Accused's answer of the 29th October in which he repeated his instructions,

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was detained by the Censor. On the 7th October Checcacci reported the sale of six cases to Jaroslaw, and that he hoped to sell him the other eight Accused's reply on the 29th October, for this letter answered two of Checcacci's, was that Checcacci ought to have sold the six at a higher price, and that he must try to sell the eight at profitable prices. On the 14th October Checcacci reported having sold all 14 cases to Jaroslaw, but he had cancelled the sale of three as Drouet wanted them. On the 12th November Checcacci reported having shipped eight cases to the Jaros Mica Company and received a cheque for the amount. The other three cases were apparently not delivered as, on the 19th November, Checcacci writes that the six cases were still under consideration at the London Custom House.

There was some discussion arising out of this last letter as to whether the eight cases of mica were delivered to Jaroslaw or to some other Company. I feel no doubt that Checcacci in writing of the Jaros Mica Co. refers to Jaroslaw in spite of some confusion raised by the passage in the letter which refers to "this American Co" and the later passage "send me samples . . . . . and I shall propose them to the Jaros Cincinnati Co. and Microw Mica Co. of Chicago." It is suggested by the learned Advocate-General that the letter is a blind and that the writer is referring to German Companies. Perhaps it is so. But that fact should not go against the accused. Up to this point the correspondence had been perfectly straightforward. There is no reason to suppose that accused had at any time used veiled language in his letters to Checcacci, and if the latter suddenly took to doing so, any adverse inference that might be drawn against Checcacci from that fact must not reflect on the accused.

In this case, as in the first case, we have the fact that Checcacci was dealing with an enemy firm and finally sold to it the cases of mica which form the subject matter of the charge and delivered some of the cases. We also have the fact that accused directed Checcacci in the letters of 15th, 22nd and 29th October, the first two of which reached Checcacci for they were answered, to sell the mica. But it is sought to exonerate the accused by a fact which distinguishes this case from the first, *viz.*, that Checcacci sold the goods before he had any instructions from the accused to do so. He reports the sale of six cases in his letter of the 7th October and of all 14 in his letter of the 14th October, whereas it was only on the 21st October, that Checcacci received accused's letters of 17th and 24th September, and even in those two letters accused did not authorise Checcacci to sell to Germans. In the first he only told his agent to get the goods into his possession or reship, in the second he says he has told the Bank to deliver the mica to him and asks for an advance on it.

Checcacci, however, did not actually part with the mica till the 12th November on which date he also got payment for it. At that time he had received accused's letters of 8th October and 15th October. In the first accused had instructed him not to sell to Germans and then qualified the instructions in the postcript. The letter of the 15th was the one in which he told Checcacci to try and sell "elsewhere." At the time of the writing of the former letter, though trading with the enemy had been forbidden in the Royal Proclamation of the 5th August, published in India on the 12th September, a month before the letter was written, disobedience to the Proclamation had not been made an offence. But when the second letter was sent the Ordinance making disobedience to a Royal Proclamation penal had been published. Accused's instructions even of the 8th October did not reach Checcacci till early in November ; long before they reached him they had become penal, accused was in a position to countermand the instructions and as he did not do so he must be held liable for the result arising out of his instructions. It is true that he qualified the permission to sell by the proviso, "if the British Government do not take any offence or be contrary to their law or the London people are still selling them," but the accused cannot shelter himself by saying he left the matter to the discretion of his agent. The nature of his instructions will of course very largely affect the punishment to be awarded, but it will not affect the liability. As the goods, or some of them, were in fact delivered to an enemy the accused has committed an offence within the first clause of section 5 (7), viz., "supplying goods to an enemy." The offence does not come within the terms of the second clause, which was the charge framed by the Magistrate, for accused supplied the goods to Checcacci not for transmission to an enemy, but with instructions contained in his letters of the 17th and 24th September.

The accused would also be liable for abetment of the offence of supplying goods in that in his letter of 22nd October he instigated his agent to sell to an enemy firm. The instigation constitutes the offence. In fact Checcacci had reported the sale of all 14 cases before the letter reached him but that was obviously a revocable arrangement and was revoked in respect of three cases. Eight of the cases had also been delivered before the letter reached Checcacci. There may be abetment by instigation of an offence which cannot in fact be committed. In this case three of the cases out of the 11, which Jaroslaw was to have, remained undelivered when Checcacci got accused's letter of the 22nd October, and in respect of these three, at any rate, there cannot be the slightest doubt that the accused committed the offence of abetting the supply to an enemy.

On two grounds, therefore, I consider the accused has been rightly convicted in respect of the subject matter of the third charge.

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It may even be that accused would be liable for acts contravening the Proclamation, done by his agent, even if those acts were directly contrary to his instructions on the principle that where an act is itself an offence apart from any intention a principal is liable for his agent's acts. Whether that principle applies in the present case I do not consider it necessary to express an opinion.

The offence of trading with the enemy in contravention of the Royal Proclamation is an extremely serious one, and it is doubly serious if it takes the form of one of His Majesty's subjects supplying an enemy with material which can be used for the prosecution of the war while the efforts of His Majesty's Naval forces are directed to stopping such supply. If the sentence of imprisonment imposed by the Magistrate has had the effect of bringing home to the public the gravity of a disregard of the Royal Proclamation it will have done good. But in the circumstances of this case I do not consider it necessary that a sentence of imprisonment should be imposed. The situation is novel, and the legislation is novel. The effects of the Proclamation were for some time but indistinctly realized even in England; there must be still more uncertainty in India. In both cases the goods had been shipped before the outbreak of war, and though there is reason to think that owing to Checcacci's bad advice the accused allowed his business instincts to overcome his ideas of good citizenship, there is this much to be said in respect of the first charge that he was carrying out a bargain entered into before the war. I think the convictions should be upheld, but that we should alter the sentence on the first charge to one of the maximum fine which the Magistrate could have imposed, viz., a fine of Rs. 1,000 and on the third charge remit the sentence of imprisonment allowing the fine to stand: in default of payment of fine in either case the accused to undergo rigorous imprisonment for six months. I trust the reduction of the sentence will not give birth to any false ideas as to the sentence that is likely to be imposed in case of any contravention of the Royal Proclamation in future.

I understand that my learned brother, while agreeing that the appeal on the third charge should be dismissed subject to the reduction of sentence proposed, is of opinion that the appellant should be acquitted on the first charge. In the circumstances the conviction on the third charge is upheld and the sentence reduced to one of a fine of Rs. 1,000. In regard to the first charge our opinions must be laid before the learned Chief Justice for reference to a third Judge under section 429 of the Code of Criminal Procedure.

GREAVES J. This is an appeal from a conviction of the accused by the Chief Presidency Magistrate of Calcutta of two offences in contravention

of the provisions of clause 5 (7) of His Majesty's Proclamation of the 9th September 1914, "The Trading with the Enemy Proclamation Number 2." The accused was further charged with an offence in contravention of the provisions of clause 5 (9) of the said Proclamation but was acquitted on this charge. The Crown have appealed against the acquittal, but do not desire to proceed with the appeal. The accused was sentenced, under the provisions of clause 3 of Ordinance VI of 1914, which was published in the *Gazette of India, Extraordinary*, of the 14th October 1914, to eighteen months' rigorous imprisonment under one charge (the first charge) and to a like term of rigorous imprisonment and a fine of Rs. 1,000 under the charge (the third charge), or in default of payment of the fine to six months' rigorous imprisonment, the sentences of imprisonment to run concurrently.

The accused is a member of the firm of Gunput Roy & Co. of Calcutta. The firm consists of six members including the accused, and the accused was, at the time that the offences against the Ordinance, of which the accused was convicted, were committed, in control of that branch of the firm's business which exports mica, and the correspondence, of the firm which deals with that branch of the business was conducted by and under the direction of the accused, and it was under his direction that the correspondence before us was written.

The firm of Gunput Roy & Co., prior to the war had been in the habit of exporting mica to European countries including Germany. Their course of business was as follows. One Checcacci, an Italian resident at Genoa, was the sole agent of the firm in Europe for the sale of mica, having been appointed such under or by virtue of an agreement dated the 8th May 1912 and made between Gunput Roy & Co. and Checcacci, and whereby Checcacci agreed (*inter alia*) to devote his whole time and attention to the business and not to engage in any other business. Checcacci was in the habit of forwarding to Gunput Roy & Co. orders for mica from firms in Germany and elsewhere, bills were drawn by Gunput Roy & Co., on the various purchasers and discounted by the Calcutta branch of the National Bank of India who forwarded the bills together with the shipping documents to their head office in London for realization and for the handing over of the shipping documents to the purchasers against payment of the bills. In the event of the purchasers failing to pay or accept the bills the National Bank of India were entitled to call on Gunput Roy & Co. to refund the money paid by the Bank to Gunput Roy & Co., and against such refund the shipping documents would be made over to the order of Gunput Roy & Co.

The charges against the accused, in respect of which he was convicted, were (i) that during the months of September, October and November

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1914, and during the continuance of a state of war between His Majesty and the German Empire, he at Calcutta, unlawfully did contravene the provision of clause 5 (7) of His Majesty's Proclamation of the 9th September 1914. "The Trading with the Enemy Proclamation Number 2" being a Proclamation of His Majesty for the time being in force relating to trade, commercial intercourse and other dealings with any subject of the said German Empire or any person residing, carrying on business or being in the territories of the said German Empire, by trading in goods, wares and merchandise, to wit, one case of mica shipped by the s.s. "*Nore*" destined for an enemy country, to wit, the said German Empire and for enemies, to wit, certain persons trading and carrying on business together under the name and style of *Rheinische Glimmerwaren Fabrik* at Weisling, Cologne, in the said German Empire, and thereby committed an offence punishable under section 3 of the Commercial Intercourse with Enemies Ordinance No. VI of 1914. (iii) that during the months of September, October and November 1914, during the continuance of the state of war aforesaid, at Calcutta, he unlawfully did contravene the provisions of clause 5 (7) of the said Trading with the Enemy Proclamation No 2 by supplying to a certain person, namely, one G. Felice Checcacci of Genoa in Italy, certain goods, wares and merchandise, to wit, 11 cases of mica (which had been previously shipped to Marseilles *per* s.s. "*Nevassa*" and s.s. "*Chybassa*") for and by way of transmission to an enemy country, to wit, the German Empire, and to enemies, to wit, certain persons trading and carrying on business together under the name and style of *Jaroslaw Erste Glimmerwaren Fabrik* at Berlin in the said German Empire, and thereby traded in the said goods destined for the said enemy country and the said enemies and thereby committed an offence punishable under section 3 of the Commercial Intercourse with Enemies Ordinance No. VI of 1914.

The Proclamation in its preamble contains a recital that it is contrary to law to trade or have any commercial or financial transactions with any person resident or carrying on business in the German Empire or Austria-Hungary without permission.

Clause 5 (7), which is the clause under which the accused was charged and convicted, divides itself into three parts and forbids (*i*) the supply of goods, etc., to or for the use of the enemy or the obtaining goods, etc., from the enemy, (*ii*) the supply of goods by way of transmission to or from the enemy, (*iii*) the trading in or carrying of goods destined for or coming from the enemy; and the direct and the indirect carrying out of any of the acts above mentioned is prohibited by the sub-clause, and the clause itself contains a provision at the end making any person who commits, aids or abets any of the aforesaid acts guilty of a crime.

The Proclamation is a penal Proclamation and it must be construed

strictly, and the conviction of the accused can only be upheld if he be shown to have actually and in fact done one of the acts thereby forbidden, and it is not sufficient for the prosecution to show that he so acted as to show himself willing to do any of the acts forbidden by the Proclamation and, unless he in fact actually did one of the acts or possibly aided or abetted any such act, the accused cannot be convicted thereunder. The accused is, of course, fully entitled to raise and rely on any defence however technical it may be to meet a penal charge and is entitled to have the fullest weight given to any such defence. On the other hand it is, of course, necessary that, so far as possible, no restricted meaning should be placed on the words of the Proclamation and that it should be so construed as to, as far as possible, prevent the mischief aimed at, namely, the enhancement of the actual resources of the enemy by supplying him with goods or with money.

It was forcibly contended before us that sub-clause (7) involves an actual dealing with goods, and that unless it can be shown that goods were actually supplied to the enemy or so dealt with as to be placed in the enemy's power, there was no breach of the provisions of the sub-clause, and that if the words "trade in," in the last part of the sub-clause, refer to any commercial dealing or intercourse falling short of the supply of goods, or the putting of the enemy in the position of obtaining goods, there was no need for sub-clause (9), as the matters there mentioned would, in this interpretation of the clause, equally fall within the provisions of sub-clause (7). The first two parts of the sub-clause present no real difficulty. To constitute an offence under the first part of the sub-clause there must be a supply of goods to or for the use or benefit of the enemy, or an obtaining of goods from the enemy, and in my opinion it would be an offence under this part of the sub-clause if the enemy, as for example, by being placed in possession of the shipping documents, was placed in a position to obtain the goods.

To constitute an offence under the second part of the sub-clause, there must be a supply of goods by way of transmission to or from an enemy country, or an obtaining of goods by way of transmission to or for the use of the enemy. Under the first part of the sub-clause the merchant who supplies goods to or obtains goods from the enemy is aimed at, and under the second part of the sub-clause the person who acts as the medium for the transmission of goods to or from the enemy is aimed at.

It is the third part of the sub-clause which presents the difficulty, but, whatever may be the exact meaning of the words "trade in," the use of the word "destined" makes it in my opinion clear that what is contemplated is an actual dealing in or negotiation with regard to actual ascertained goods or goods capable of ascertainment which are destined for or

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coming from an enemy country or an enemy, and this, of course, would include a dealing with the documents of title to the ascertained goods.

In my opinion, therefore, sub-clause (7) deals only with goods actually in existence or capable of ascertainment, and there must be an actual dealing with the goods themselves or with the documents of title thereto to constitute an offence under this part of sub-clause (7), and in my opinion the mere intention or desire to get goods for the enemy does not constitute an offence under this part of sub-clause (7) unless, as before stated, there are goods in existence or capable of coming into existence. To constitute an offence thereunder there must be (*a*) definite ascertained goods in existence or goods capable of ascertainment which can be dealt with by the person accused, (*b*) they must be goods destined for the enemy or coming from the enemy, (*c*) there must be actual dealing in these goods. In my opinion the offer, for example, by a manufacturer of boots, to supply boots to an enemy or to an enemy's firm, even if these boots are not in actual existence at the time of the offer, provided they are capable of being made and forwarded to the enemy by the manufacturer, would be an offence against the Proclamation and a trading in goods destined for the enemy, and in this view the sending to the enemy of a catalogue of goods manufactured by or stocked by the sender of the catalogue may be an offence against the Proclamation, and I think this is none the less so because sub-clause (9) forbids the entering into commercial, financial or other contracts with or for the benefit of an enemy. It may well be that an offence which may be covered by the latter part of sub-clause (7) is specified in greater detail in sub-clause (9).

It is now necessary to consider what actually happened with regard to the case of mica forwarded by the s.s. "*Nore*" which is the subject of the first charge. On or about the 30th June 1914 Gunput Roy & Co. shipped by the s.s. "*Nore*" from Calcutta one case of mica to the *Rheinische Co.* of Cologne who were old customers of Gunput Roy & Co., and in response to an order received by Gunput Roy & Co. from the *Rheinische Co.* through the medium of Checcacci, Gunput Roy & Co. drew a bill on the *Rheinische Co.* for the value of the goods, which was discounted by the Calcutta branch of the National Bank of India and handed to them by Gunput Roy & Co. together with the shipping documents. The case was shipped to Cologne *viâ* Antwerp. When the s.s. "*Nore*" arrived at London war had been declared, and the Peninsular & Oriental Steam Ship Company, who owned the s.s. "*Nore*," notified Gunput Roy & Co. that the ship would not proceed any further and that the case of mica had been landed in London. The case of mica was in fact so landed towards the end of September 1914. Gunput Roy & Co. thereupon instructed the Calcutta branch of the Bank to instruct the head office of the Bank in London to take

delivery of the case of mica from the shippers and to make over the same to an English firm trading in London in mica, named Baker and Startin, who had previously had dealings in mica with Gunput Roy & Co.

Gunput Roy at or about the same time, namely the 24th September 1914, asked Baker and Startin to take the case of mica and dispose of it, which they eventually did paying for the goods and informing Gunput Roy of this by letter dated the 23rd October 1914.

It is now necessary to refer shortly to the correspondence which passed between Checcacci and Gunput Roy in the months of September and October 1914, and in so doing I do not forget that the Ordinance under which the accused is convicted only came into force on the 14th October 1914. On the 24th September 1914 Gunput Roy & Co. write to Checcacci saying they have instructed the National Bank of India to deliver the case of mica to Baker and Startin, whom they had instructed to pay for it, and take delivery from the bank, and they tell Checcacci that if he wants the case, he is to ask Baker and Startin for it, but that he is not to give the case to the *Rheinische Co.* without payment ; and on the 8th October 1914 Gunput Roy & Co. write to Checcacci recommending him not to sell any goods to German buyers, but in a postscript they add that he may sell to German buyers if the British Government do not take offence and if it is not against the law ; they again write on October 15th telling Checcacci not to deliver the case to the *Rheinische Co.* without payment ; and on October 22nd they tell him to receive the case from Baker and Startin and to deliver it to *Rheinische Co* against payment ; and on October 29th they tell Checcacci to ask Baker and Startin to send the case to him and that he is to deliver it to *Rheinische Co.* against payment ; this last letter was stopped by the post and never reached Checcacci.

I should add that it appears from a letter of Checcacci of the 16th September 1914 written to Gunput Roy & Co. that Checcacci was in communication with the *Rheinische Co.* who wanted the case of mica, that he passes on this information to Gunput Roy & Co. on the 16th September 1914, who got the letter on October 13th, and replied to it by the letter of October 15th, above referred to. I have come to the conclusion from the correspondence that at the time this letter was written the case of mica was no longer destined for the enemy within the meaning of sub-clause (7) of the Ordinance. On the 24th September 1914 Gunput Roy & Co. wrote to Baker and Startin asking them to pay for and take from the Bank and dispose of the case of mica. (I have no copy of this letter, but the reply of Baker and Startin of the 23rd October 1914 and Gunput Roy & Co.'s letter of the 24th September 1914 make it clear what the letter contained). Whether the transaction with Baker and Startin was an out-and-out sale or not, or merely an arrangement whereby they paid for and took the mica to oblige Gunput

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Roy & Co., hoping to dispose of it, if possible, but looking to Gunput Roy & Co. as the real owners and liable to them if the case were not sold, is difficult to say, but after the 24th September 1914, that is to say when the letter of October 15th was written, in my opinion, the goods in question were not destined for an enemy country within the meaning of the Proclamation and were not capable of being sent to an enemy country in view of the fact that the export of mica from England had been forbidden, and there has been, as before stated, no offence against that part of the Proclamation under which the charge was framed. The mere willingness of Gunput Roy & Co. that the mica in question should be delivered to an enemy firm is not in my opinion, under the circumstances, a breach of that part of the Proclamation under which the charge was framed and the conviction on this charge cannot, in my opinion, be upheld.

The circumstances with regard to the goods which form the subject matter of the third charge are as follows. On the 4th June 1914 Gunput Roy & Co. shipped from Calcutta by the s.s. "*Chybassa*" eight cases of mica to the order of a Drouet of Paris, and on the 16th July they shipped other three cases by the s.s "*Nevassa*" to the same Drouet and three cases to the orders of the *Manufacture Parisienne* of Paris. Bills were drawn by Gunput Roy & Co. on the purchasers, and discounted by the Calcutta branch of the National Bank of India and sent to the National Bank of India in London for realisation. By the time the goods arrived in Europe war had broken out and both Drouet and the representatives of the *Manufacture Parisienne* had been called up for military service and were actually with the French forces at the front and could not be communicated with or take delivery of the goods, and the position was that the National Bank wanted to be recouped the monies paid by them to Gunput Roy & Co. for discounting the bills and Gunput Roy & Co. were desirous of disposing of the goods as they had to repay the Bank.

The eight cases of mica shipped by the s.s. "*Chybassa*" were delivered at Marseilles and the six cases shipped by the s.s. "*Nevassa*" were delivered in London. There is no evidence before us as to what happened to three of the six cases which were delivered in London, but I am satisfied on the evidence that the remaining three were ultimately taken by Drouet, the original consignee, and that the eight cases shipped to Marseilles, under the circumstances hereinafter set forth, ultimately reached a firm called Jaroslaw carrying on business at Berlin in Germany (but having branches in England and other European countries) and an enemy within the meaning of clause 3 of the Proclamation, and I am satisfied on the evidence that these eight cases reached the Jaroslaw German business. Gunput Roy & Co. had previous dealings with Jaroslaw and with the German branch of the business. The circumstances under which the eight cases of mica reached

Jaroslaw are set forth in the correspondence which was before us dealing with the third charge.

The first material letter is one from Checcacci addressed to Gunput Roy and Co. on the 16th September 1914 wherein he states that Jaroslaw had telegraphed to him asking him to have all the mica shipped to Marseilles and refused by Drouet sent to him at Genoa where they (Jaroslaw) would take delivery, and saying that he thought Gunput Roy and Co. should instruct the National Bank to make over to him free the documents for all the Marseilles goods and that he (Checcacci) would dispose of them at Genoa.

This letter was received by Gunput Roy and Co. on the 13th October 1914 and answered by them on the 15th of that month, the answer stating that with regard to the 14 cases at Marseilles they had instructed the bank to deliver to him the documents and trusting that Checcacci had received the same from the bank and brought the cases to Genoa, and asking him to do his best to sell them elsewhere and remit the amount—the word "elsewhere" in my opinion clearly means elsewhere than to the original consignees, Drouet and the *Manufacture Parisienne*. Checcacci wrote another letter to Gunput Roy & Co., on the 23rd September 1914, stating that Jaroslaw wished to buy the mica lying at Marseilles and not taken over by Drouet and the *Manufacture Parisienne*, and asking Gunput Roy & Co. to instruct the National Bank to deliver the documents to him and that he would then have the mica sent to Genoa, as the buyers were Jaroslaw and he could not sell the mica from Marseilles. This letter was received by Gunput Roy and Co. on the 20th October and answered by them, on the 22nd, in a letter which stated that Gunput Roy & Co. had instructed the National Bank to deliver the documents, and asked Checcacci to sell the goods promptly at profitable prices and remit the money.

Checcacci wrote a further letter to Gunput Roy & Co., on the 30th of September, saying that he could sell the Marseilles goods, and that possibly Jaroslaw would take them. This letter was received by Gunput Roy & Co. on the 28th of October, and answered by them on the 29th of October, the answer stating that Gunput Roy & Co. had instructed the National Bank to deliver the documents to him Checcacci and expressed a hope that he had received the documents and brought the 14 cases to Genoa and asking him to dispose of them at profitable prices; the letter further said that "we note that you have sold six cases to Jaroslaw." This letter was intercepted in the post and never in fact reached Checcacci.

From the 14th October onwards Checcacci wrote various letters to Gunput Roy & Co. which were intercepted in the post, and letters were written to Checcacci by Gunput Roy & Co. on various dates in November, but these were with one exception, intercepted in the post, and in my

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opinion this further correspondence does not carry matters any further and need not be considered.

It is in evidence before us that Checcacci effected the sale to Jaroslaw on or about the 9th October, and before he received the letters of Gunput Roy & Co. above referred. I cannot find any letter from Gunput Roy & Co. to Checcacci which in express terms directs or sanctions a sale of the mica to Jaroslaw, but in my opinion the correspondence certainly shows that Gunput Roy & Co. knew that Checcacci was effecting a sale to Jaroslaw and that they did not in express terms forbid such a sale. Under these circumstances did the accused commit the offence against sub-clause (7) with which he is charged, that is to say did he supply goods for transmission to an enemy country or an enemy and trade in goods destined for an enemy? In my opinion he clearly did unless he is saved by the fact that Checcacci effected the sale before he, the accused, knew or impliedly assented thereto.

Ordinarily a person is not criminally liable for an act or omission unless he has himself committed or omitted the act, or authorised or known of, or shut his eyes to, the commission, or omission, and the condition of mind of an agent is not imputed to the master or principal so as to make him criminally liable, and a master is not criminally liable merely because his agent commits a wrongful act. But in cases where a particular intent or state of mind is not of the essence of the offence, the acts or defaults of an agent in the ordinary course of his employment may make the master or principal criminally liable, although he was not aware of such acts or defaults and even where they were against his orders: *Commissioner of Police* v. *Cartman* (1), *Coppen* v. *Moore* (2), the Laws of England by the Earl of Halsbury Vol. IX, p. 235 [note (*d*)] and cases there cited. In my opinion the principles expressed above apply to the acts forbidden by the Proclamation. To constitute an offence punishable thereunder a particular intent or state of mind is not in my opinion necessary, it is sufficient to constitute an offence thereunder by the principal that the act has been committed by the agent, even although not expressly authorised by the principal, although of course in awarding punishment for the offence these circumstances would and must be taken into account.

Considering the enormous importance as illustrated by the present war of the cutting off from the enemy of all sources of supply, this view of the Proclamation and its effect is not, in my opinion, unduly harsh or an undue straining of the words and spirit of the Proclamation. It is necessary that the trading community should realise not only that they must take no

(1) [1896] 1 Q. B. 655. (2) [1898] 2 Q. B. 306.

actual steps to add to or increase the resources of the enemy, but that they must be active to prevent any act by their servants or agents which can possibly add to the enemy's resources and that unless they do so they fall within the mischief aimed at by the Proclamation and render themselves liable to the penalties imposed by the Ordinance for any breach of what is forbidden by the Proclamation.

The result is that, in my opinion, the accused was rightly convicted on the third charge, but in my opinion the sentence was under the circumstances excessive and in my opinion the sentence of imprisonment should be remitted, but the fine of Rs. 1,000 imposed by the Presidency Magistrate should stand. I wish to add that in my opinion the correspondence is perfectly open and straight forward, but I regret that the accused, although he apparently had considerable doubt as to whether any sale to the enemy was not illegal, did not take immediate steps to make it impossible that any of the goods in question should reach the enemy and take legal advice as to his position. It is only fair to the accused to add that he apparently made no attempt to ship goods after the outbreak of war but only concerned himself with goods which had been shipped some time before war broke out. And of course the matters dealt with by the Ordinance are new so far as this generation is concerned, the Ordinance, moreover, was not, I understand, translated into the vernacular and the accused is ignorant of the English language. With regard to the question as to whether the accused could, in respect of either or both charges, be convicted of abetment, the fact remains that he was not originally charged with any such offence, and although our powers are wide under section 423 of the Code of Criminal Procedure, and although the question was to some extent argued before us and the advisers of the accused were offered an opportunity for further argument on this point which they did not desire to avail themselves of, I for myself should be loath, under the circumstances of this case, and at this stage, to alter the charge and convict the accused of abetment, and, moreover, there seems considerable doubt whether a conviction for an offence can be altered into a conviction for abetment of that offence.

Owing to this difference of opinion between the learned Judges, the case was referred, under s. 429 of the Criminal Procedure Code, to Woodroffe J.

Sir S. P. Sinha (with him *Mr. C. C. Ghose*, *Mr. Khaitan* and *Babu Manmatha Nath Mookerjee*), for the appellant. The only question here is as to the legality of the conviction on the first charge. The

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case of *Sarat Chandra Mitra* v. *Emperor* (1) is distinguishable as there was but one offence charged there.

[*Mr. Monnier.* Under s. 429 of the Criminal Procedure Code the third Judge has to decide the case only with reference to the point on which there was a difference of opinion: *Durga Charan Sanyal* v. *Emperor* (2) and *Chukkapalli Ramayya* v. *Emperor* (3).]

Sir S. P. Sinha (after stating the facts and reading and commenting on the letters relating to the first charge). The letters form a series and must be read as subject to the instructions contained in that of the 8th October against the sale to Germans which are not qualified by the postscript to it. Baker & Startin took up the case *per* "*Nore.*" It never left London nor was put in the course of transmission to Checcacci or the German firm. The directions to the former were contingent, and he refused to apply to Baker & Startin for it. To support the conviction there must be (*i*) a trading with the enemy and (*ii*) goods destined for an enemy country. As to the first point, actual supply is required by the first two portions of sub-cl. (*7*) and actual carriage under the last portion. As three out of the four prohibited acts in sub-cl. (*7*) require actual dealing with goods, the words "trade in" must also be taken to imply an actual handling of the goods or the documents of title. Trading is not complete without handling. To constitute trading there must be delivery or the goods put in the course of transmission. Mere intention or willingness is not sufficient. The stages of a transaction of trading are, generally negotiation, contract and supply. If "trade in" means any commercial dealing short of supply or putting the enemy in the position of obtaining goods, sub-cl. (*9*)

(1) (1910) I. L. R. 38 Calc. 202. (2) 8 C. L. J. 59, 63.
(3) (1910) Mad. W. N. 77, 106.

would be covered by sub-cl. (7) and become redundant. But the former relates only to contracts and is not included in sub-cl. (7). The sub-clauses antecedent and subsequent to sub-cl. (7) refer also to specific overt acts. Refers to meaning of "trade" in Cent. Dict., Vol. VIII, and Halsbury's Laws of England, Vol. XXVII, p. 509. The literal meaning of "trade" is buying and selling: *Bank of India* v. *Wilson* (1). If I have goods in my shop and tell my servant to sell them to a German, it is not trading, still less if the former refuses to do so. The present case may be one of intention, willingness or an attempt to trade but not of trading: *The Abby* (2). Abetment is punishable by the Proclamation but not an attempt. Section 511 of the Penal Code does not apply. Next the mica when shipped was not destined for an enemy country there being no war then. On arrival at London they were taken up by Baker & Startin and Germany was no longer their destination. The goods must be in existence at the time of destination. They were bought by the said firm. "Destined" read with "coming from" means "on the the way to." The accident of the prohibition of export of mica turned the case in my favour: *The Abby* (2). Refers to view of Greaves J. The offence is not abetment. The appellant did not actively instigate the sale to Germany but merely gave his agent permission to sell to *Rheinische: see* Ratanlal on "Crimes," 7th Ed., p. 209. The Appellate Court cannot alter the conviction to one of abetment: *Reg.* v. *Chand Nur* (3), *Padmanabha Panjikannaya* v. *Emperor* (4), *Singaravelu Pillay* v. *Emperor* (5), though a different view appears to have been held in *Yeditha Subbaya* v. *Emperor* (6).

(1) (1877) 3 Ex. D. 108, 113.
(2) (1804) 5 C. Rob. 251, 254.
(3) (1874) 11 Bom. H. C. 240.
(4) (1909) I. L. R. 33 Mad. 264.
(5) (1912) 14 Ind. Cas. 203
(6) (1912) 23 Mad. L. J. 722.

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Mr. Monnier (with him *Babu Manindra Nath Banerjee*), for the Crown. The facts I rely on are, in the first place, that between the 22nd and 24th September the appellant wrote to the Bank to deliver the mica to Baker and Startin, and to the latter to pay and take delivery and to send the same to Checcacci, and that he directed the agent by letter to apply to Baker and Startin for the case and to deliver to the *Rheinische* against payment. Although these letters were written and posted before the date of the Ordinance, the directions contained in them became operative only on the receipt of the letters after the 14th October, and the letters might be regarded as acts done, and the instructions as directions given, after such date. Further the appellants intimated the contents of the above letters in his own of October 15th, 22nd and 29th and 5th November, and directed his agent to act on those instructions. He ratified his previous acts and directions done and given between the 22nd and 24th September by these subsequent letters. If these contentions are not correct, I rely, in the next place, on the two letters of the 15th and 22nd October putting aside the intercepted letters of the 29th October and 5th November which could only be used to prove collateral facts, though a conviction has been had in England even on intercepted letters. I contend that the directions contained in the letters of the 15th and 22nd October are themselves sufficient to constitute trading with the enemy. The language of the Ordinance and Proclamation No. 2 is wanting in legal precision. The preamble to the former, and s. 3, refer to "trade, commercial intercourse or other dealing" but the short title is "Commercial Intercourse, etc." The second preamble to the Proclamation speaks of "trade or any commercial or financial transaction" but the title is "*Trading* with the enemy." The

words "trade" and "commercial intercourse" appear to be used interchangeably in these enactments. Compare s. 2 of the Trading with the Enemy Act (45 Geo. V c. 87) in England.

Trading with the enemy is contrary to law independently of the Ordinance and Proclamation, (*see* second preamble of the latter), which are merely based on and give statutory effect to, the rule of International and English law that one of the immediate consequences of war is the interdiction of all commercial intercourse with the enemy unless by license: Wheaton's Inter. Law, 4th (Eng.) Ed., s. 309. *The Hoop* (1), *Esposito* v. *Bowden* (2) and *Porter* v. *Freudenberg* (3). The scope and object of the Ordinance and Proclamation is, therefore, to prohibit *all* unlicensed *commercial intercourse* with the enemy. Turning next to sub-cls. (*7*) and (*9*) of Proclamation No. 2, they must firstly be read as mutually exclusive, and the four parts of sub. cl. (*7*) must be interpreted similarly. "Trading" does not include supply or carriage of goods or a commercial contract, otherwise these provisions would overlap and be redundant. Next the word "trading" must be taken in connection with the scope and aim of the Ordinance and Proclamation: *see* Maxwell on Interpretation of Statutes, Ed. 1912, pp. 85, 86. In this view trading is any dealing with goods by way of commercial intercourse with the enemy excluding the specific acts of supply, carriage and contract provided for in sub-cls. (*7*) and (*9*), whether the goods or the shipping documents pass or not. From the point of view of the dictionary meaning of the word "trade," it should be noted that "trade" is derived from "*treaden*" and not the Latin "*tradere*" (see Century Dict. Vol. VIII, p. 6415). The term has a variety of

(1) (1799) 1 C. Rob. 196. (2) (1857) 7 E. & B. 763, 779.
(3) [1915] 1 K. B. 857, 867.

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meanings from buying and selling to "commerce and traffic": *see* Dict. Cent. p. 6415 "trade" (8); Webster's Dict. p. 2181 "trade" (6) (b); and the *v. i.*: Halsbury, Vol. XXXII pp. 509, 510. *Bank of India* v. *Wilson*(1) cited by the opposite side is really in my favour: *see* pp. 113, 120, 121, where it was held that "trade" is not limited to buying and selling. Trading does not necessarily involve a physical handling of goods, as when a man opens a shop and exhibits goods but sells nothing. The real question is which of the several meanings of the word "trade" is the most apt *with reference to the scope and intent of the enactments.* This is, I submit, "commerce" or "traffic." A direction to an agent to deliver property capable of transfer at the time is "trading": *see* Wheaton *supra* pp. 439, 443, *Rex* v. *Louis Bartel* (2) mentioned in 50 L. J. 52, and the case in the "Times" of 31 Dec. 1914. Both the Judges of the Divisional Bench agreed that the appellant's acts amounted to trading. Comments on Greaves J.'s judgment on the point. As to the argument that "trading" involves a handling of goods because the word appears in the sub-clause with "supply" and "carry", I submit that the four acts therein prohibited are not *ejusdem generis.* Refers to *In the matter of the Second Grade Pleaders* (3).

The next question is whether the mica was "destined" for an enemy after 14th October the date of the Ordinance. The word "destined" in sub-cl. (*7*) when used in connection with "trade in" implies "intended for": *see* Cent. Dict. Vol. II p. 1568 and Webster's Dict. p. 606. The expression "coming from" means "having its origin" in the enemy country, and not "on the way from" it. The question of the destination of goods depends on intention. Goods acquire the character

(1) (1877) 3 Ex. D. 108. (2) (1914) Unreported.
(3) (1910) I. L. R. 34 Mad. 29, 39.

of an enemy destination when the owner or the person having control of them specifically intends to send them to such place and performs overt acts in pursuance of such intention, though they have not been put in the course of transmission nor even moved at all. The directions contained in the appellant's letters of 15 and 22 October to Checcacci, showed that the former intended the mica to go to Genoa for sale to a German firm, and were sufficient overt acts to effectuate his intention. The mica then became destined for an enemy, even if the direction to Baker and Startin to send the same to Checcacci is considered to be an act done before the date of the Ordinance. Greaves J.'s view that the mica could not be destined for Germany because of the Proclamation of 15th October prohibiting export of it to Italy, it is respectfully submitted, confuses the distinction between *lawful* and *actual* destination. The prohibition was not in the first place absolute: the mica could have been exported to France and thence to Genoa. In the next the question is not whether the goods were *legally* destinable for Germany but whether they were *in fact* so destined. Even if the prohibition had been absolute but the owner determined to send it to Germany in violation of the law the goods would become destined for an enemy country. Baker and Startin took the mica as agents of the appellant, as appears from the directions given by him to Baker and Startin to send it to Genoa, and to Checcacci to apply for it, bring it to Genoa, and sell it to *Rheinische* against payment. I concede that, if at the time the instructions reached Baker and Startin and Checcacci, the mica had been sold by the former, it could not thereafter be destined for an enemy country, but there is no evidence when the English firm disposed of it so that the ownership of the appellant in it passed to the purchaser. The present

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case is not one merely of intent, willingness or attempt to trade. The appellant did all he could to get the mica to his agent at Genoa for sale to *Rheinische*. The writing and posting of the appellants intercepted letters of October 29 and November 5 may have amounted to an *attempt* [as to the meaning of which, see *Queen-Empress* v. *Luxman Narayan Joshi* (1)], but the offence was completed when the letters of the 15th and 22nd October reached Checcacci.

If the charge of the substantive offence fails, the acts of the appellant amount to abetment of supply to, or of trading by Checcacci, within ss. 40 and 41, read with s. 108, Expl. (2), illust. (*a*) and s. 108 (A) of the Penal Code, and the punishment would be governed by s. 116. The appellant's directions to Checcacci in the letters of the 15th and 22nd October amount to abetment. The passage in Ratanlal, p. 209, is really against the appellant. Even if the English law applies there is abetment, though the act abetted was not committed: see *Rex* v. *Higgins* (2), *Rex* v. *Phillips* (3), and the recent case of *Rex* v. *Spencer* (4) decided under the Proclamation No. 2. The Appellate Court has power to alter a conviction of a substantive offence into one of abetment on the *same* facts which the accused had to meet at the trial if he is not thereby prejudiced: *Lala Ojha* v. *Queen-Empress*(5). This principle was applied by the Privy Council in *Henry* v. *King-Emperor* (6) and by the Allahabad Court in *Emperor* v. *Madho Ram* (7). A conviction of a substantive offence may be altered on appeal to one of abetment: *Emperor* v. *Prasanna Kumar Das* (8). The case of *Padmanabha Panjikannaya* v. *Emperor*

(1) (1899) 2 Bom. L. R. 286.
(2) (1801) 2 East 5.
(3) (1805) 6 East 464.
(4) (1914) 138 L. T. 37.
(5) (1899) I. L. R. 26 Calc. 863.
(6) (1906) 11 C. W. N. xc.
(7) (1906) 4 All. L. J. 44, 46.
(8) (1904) I. L. R. 31 Calc. 1007, 1010.

(1) has been explained in *Yeditha Subbaya* v. *Emperor* (2).

Mr. Ghose, in reply. If the acts of the appellant do not amount to trading, they cannot amount to abetment of trading by Checcacci.

WOODROFFE J. This matter has been referred to me on a difference of opinion between Mr. Justice Beachcroft and Mr. Justice Greaves.

The accused was charged with three offences. He was acquitted on the second charge by the Magistrate and the Government appeal against that acquittal was withdrawn. Both the learned Judges convicted the accused under the third charge. Therefore, the only matter before me for decision is that on which the learned Judges differed, namely, the first charge: Mr. Justice Greaves being of opinion that the accused should be acquitted and Mr. Justice Beachcroft expressing the opinion that he was guilty of the offence, and if not, of abetment of it though not charged therewith. He would, therefore, have fined the accused Rs. 1,000 on this charge in addition to the fine which both the learned Judges have agreed should be imposed in respect of the third charge.

It is not necessary for me to recapitulate the facts which are set out in the judgments which are before me. The questions are firstly as to the meaning of the word "trading" in the first charge, and nextly whether, if there was a trading here in respect of one case of mica shipped by s. s. "*Nore*," it can be said that, at the date of the operation of the Ordinance, that is the 14th October 1914, the goods were destined for an enemy country.

For the prosecution it is contended that the acts

(1) (1909) I. L. R. 33 Mad. 264. (2) (1912) 23 Mad. L. J. 722.

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of the accused in directing the bank to make over the goods to Messrs. Baker and Startin of London, the direction to the latter to take up the goods, the direction to the latter to send the goods to Checcacci, an Italian agent at Genoa on his application, and lastly his direction to the latter to deliver the goods to *Rheinische Co.*, and receive payment constitute trading. Now it seems to me clear that, as the Ordinance was not retrospective, the only acts at which I can look, for the purpose of establishing the offence with which the accused has been charged, are such as took place after it was enacted, namely, the directions to Checcacci to hand over the case of mica to the German firm. The other facts are only relevant as establishing the circumstances under which it is alleged that it became possible to do the last-mentioned act, unless they also amount to ratification of acts done and directions given prior to the date of the publication of the Ordinance.

I may here mention that the prosecution does not rely on the letter of the 5th November 1914 as it was never sent, being intercepted by the Censor.

Now, does the act to which I have referred, assuming for the sake of argument that there is a ratification of instructions given to Messrs. Baker and Startin, amount to "trading"? For the defence it is contended that this term involves an actual handling with the goods and not mere directions such as we have before us, which were in fact not carried out. For the prosecution it is contended that the word "trading" includes all forms of commercial intercourse. Both the learned Judges appear to have rejected the contention on this point which was put forward on behalf of the accused. It is not necessary, however, to go further into this part of the case, for, even assuming in favour of the prosecution that the

acts charged amounted to "trading" within the meaning of the Ordinance, I agree with Mr. Justice Greaves that, whether there was a trading or not (which it is unnecessary to decide) the goods were not, on or after the 14th October 1914, the date of the Ordinance, destined for an enemy country. Now, what is the meaning of the word "destined"? For the defence it is contended that if we look at the words "or coming from" in the Proclamation, "destined" must mean going to, that is, on the way to an enemy country. The goods were then, it is said, in London and remained there from before the date of the operation of the Ordinance and were, it is contended, incapable of being sent to an enemy country as export of mica from England had been forbidden except to Belgium, France, Russia, Spain and Portugal (*see* page 407 of the Manual of Emergency Legislation). I do not assent to all the terms of the argument by which the accused's contention is sought to be supported. But I come to the conclusion on the whole that the contention itself should be given effect to.

I agree with Mr. Monnier, who appears on behalf of the prosecution, that we must not confuse legal destination with actual destination. It is true that after the Proclamation the exportation of mica was prohibited at law. But it is possible, of course, that it might in fact be exported in disobedience of that law. Nextly, the export of mica was not altogether forbidden. It was allowable to some countries from which the goods exported might possibly have found their way to enemy destination. Nextly, I am disposed to accept his argument that the words "destined," when used in connection with the word "trading," is not limited to the sense which the defence asked me to accept, but is equivalent to the term "intended for." But assuming this point in favour of the prosecution

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can it be then said that the goods had an enemy destination at any time after the proclamation of the Ordinance on the 14th October 1914. The case of mica was shipped before the war. It had then undoubtedly an enemy destination. But on its arrival at London war had then broken out and the goods were landed there. Messrs. Baker and Startin of London under instructions of the accused took up and paid for the goods. If this was a real purchase by them and not a mere accommodation, there is no case for the prosecution. For in that event the goods were not in existence, so far as any disposition of them by the accused was concerned, after the date upon which Messrs. Baker and Startin took over the goods from the bank and paid for them. But I will again assume for the sake of argument in favour of the prosecution that Messrs. Baker and Startin did not purchase outright for themselves, but merely took over the goods on behalf of the accused and held them for him subject to his further directions. If so when was it, that the enemy destination, which had been intercepted by the landing of the goods and the taking over of them by Messrs. Baker and Startin, again arose. As regards any acts which are said to re-establish the enemy destination by the accused, I can, as I have already said, only look to what was done by him subsequent to the date of the Ordinance of the 14th October. Then, are the two letters of the 15th and 22nd October in which the accused directed his Italian agent to deliver the case against payment to the German Company sufficient to give the goods an enemy destination? The point is one which is not altogether free from doubt. But on the whole I am of opinion that the question should be answered in the negative; and in any case, if the point is a doubtful one, the accused is entitled to the benefit of it. For we must

note that at the time when these two letters were written the accused was unaware of what had happened to the goods at home, namely, that Messrs. Baker and Startin had refused to export the goods and in fact the goods were never exported. They had refused to export the goods, because, as they stated, such exportation was forbidden by the Ordinance. The directions given by the accused in ignorance of this fact could in any event only take effect on the arrival at London of the letters in which they were contained; and even upon such arrival they had no operation for the reasons stated and the goods, therefore, never in fact acquired an enemy destination.

I may point out in this connection that the letter of the 15th October was sent only one day after the Ordinance which may, therefore, very well not have come to the notice of the accused. The Ordinance itself was not translated into the vernacular until the 22nd of December after the date of the second letter of the 22nd of October. Nothing, moreover, has been shipped by him after the date of the Ordinance.

Then it is sought to establish that, if that be the case, there has been an abetment of supplying or of trading by the accused, which is prohibited by the Ordinance. I am not prepared to hold as a universal rule that in no case can there be a conviction for abetment where the charge was only for the principal offence. In the present case the accused was not originally charged with abetment. There is also the question which has been raised by Mr. Ghose, on behalf of the accused, as to whether there can be in fact an abetment of an offence under the Ordinance where in fact no offence has been committed, in other words, whether the principle enacted by the Penal Code is applicable to an offence punishable under the Ordinance. In any case it is in the discretion

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INDAR CHAND v. EMPEROR.

WOODROFFE J.

of the Court whether it should allow fresh charges being tried in appeal. Mr. Justice Greaves expressed the opinion that this was not a case in which this should be done. I agree with him in holding that, assuming that the Court has jurisdiction to entertain this new charge in appeal, this is not, under the circumstances, a case in which I should do so.

I, therefore, agree with him that this first charge has not been established and I acquit the accused of it. As a result the accused is acquitted of the first two charges and convicted of the third charge for which he has been fined Rs. 1,000.

The accused is entitled to get back the briefs made over for the use of the Court and books of account and other papers which have been taken by the prosecution and which are now held by them.

E. H. M.

ORIGINAL CIVIL.

Before Greaves J.

ALI HAFFIZ

v.

ABDUR RAHAMAN.*

1915

March 17.

Parties—Civil Procedure Code (Act V of 1908) s. 92, O. I, r. 3—Public Religious Trust—Suit to remove a trustee and to recover possession of trust property in the hands of a third party—Joinder of parties—Alienee of trustee.

Where in a suit under s. 92 of the Civil Procedure Code (Act V of 1908) the second defendant, who was the alienee of the trust property, the subject of the suit, contended that the suit should be dismissed as against him on the ground that he was not a necessary party to it :—

Held, that there is no reason why, having regard to the provisions of O. I, r. 3 of the Civil Procedure Code, the second defendant should not be made a party to the suit ; nor why, if the decision of the Court is against him, he should not be declared to be a trustee of the trust property and be directed to convey the property.

Budh Singh Dhudhuria v. *Niradbaran Roy* (1), and *Budree Das Mukim* v. *Choony Lal Johurry* (2) distinguished.

Compania Sansinena de Carnes Congeladas v. *Houlder Brothers* (3) referred to.

THIS was a suit for a declaration that a Bengali, deed of *towliatnamah* executed by one, Vinkey Raur, a Mahomedan woman governed by the Sunni sect of Mahomedan law, and dated the 3rd February 1815, is valid and operative. Also for a declaration that the first defendant, Abdul Rahaman, is not a fit and proper person to act as mutwalli of the wakf

* Preliminary objection in Original Civil Suit No. 484 of 1914.

(1) (1905) 2 C. L. J. 431. (2) (1906) I. L. R. 33 Calc. 789.
(3) [1910] 2 K. B. 354.

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premises at No. 67, Machuabazar Street in the town of Calcutta, and that he should be removed from further acting as mutwalli, and that in his stead two other persons should be appointed mutwallis of the wakf property, or such other person as the Court might direct; And for a further declaration that the alleged sale of the wakf property by the first defendant, Abdul Rahaman, to the second defendant, Munshi Gholam Mowlah, is void and inoperative. The plaintiffs further prayed for an order that the defendants, Munshi Gholam Mowlah and Abdul Rahaman, should deliver up a certain Bengali instrument of conveyance dated the 12th June 1910 for cancellation, and execute such releases in favor of the new mutwallis as may be necessary to perfect the title of the plaintiffs, and that the wakf property should be vested in the new mutwallis.

By his written statement the second defendant, Munshi Gholam Mowlah, pleaded that he was not a proper party to the suit, which was for the execution and administration of a trust and framed under s. 92 of the Code of Civil Procedure, and that no relief by way of ejectment or otherwise could be granted against him. He further pleaded that the suit as framed was bad for misjoinder of parties as also of causes of action. He, therefore, prayed that on these grounds the suit should be dismissed as against him. He also denied that the subject matter of the dispute was trust property.

Mr. S. R. Das, (with him *Mr. A. Rasul* and *Mr. Z. R. Zahid Suhrawardy*), for the second defendant, Munshi Gholam Mowlah, took the preliminary objection that there had been a misjoinder of parties and contended that where there is a claim for the administration of a trust, which falls within the purview of

s. 92 of the Civil Procedure Code, as is the case here, a claim to eject an alienee does not come within the scope of the section; nor can a decree for ejectment be made in favor of the plaintiff against a stranger to the trust. In the suit as framed there has been a misjoinder of parties as also of causes of action; and as against the second defendant the suit should, therefore, be dismissed: *Budh Singh Dhudhuria* v. *Niradbaran Roy* (1), *Huseni Begam* v. *The Collector of Moradabad* (2), *Kazi Hassan* v. *Sagun Balkrishna* (3), and *Budree Das Mukim* v. *Chooni Lal Johurry* (4).

Mr. S. A. Ashgar, (with him *Mr. P. N. Chatterjee*), for the plaintiffs. We rely on *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav* (5), in which the Court decided that a transferee is a proper party in a suit under s. 539, now s. 92 of the present Civil Procedure Code. In the case of *Budh Singh Dhudhuria* v. *Niradbaran Roy* (1), which is relied on by the other side, Mr. Justice Harington expressed no opinion upon the question of joinder of parties. Mr. Justice Mookerjee no doubt stated that he agreed with the decisions in *Huseni Begam* v. *The Collector of Moradabad* (2), and *Kazi Hassan* v. *Sagun Balkrishna* (3); but we submit that his observations are obiter, and these decisions have not been followed in other cases: see *Neti Rama Jogiah* v. *Venkatacharulu* (6), *Ghazafar Husain Khan* v. *Yawar Husain and Mehdi Hussain* (7) and *The Collector of Poona* v. *Bai Chanchalbai* (8), in the last of which it was held that where a transferee of trust property denies that the property is the subject of a public trust for religious purposes, he is a proper and necessary party to a suit

(1) (1905) 2 C. L. J. 431.
(2) (1897) I. L. R. 20 All. 46.
(3) (1899) I. L. R. 24 Bom. 170.
(4) (1906) I. L. R. 33 Calc. 789.
(5) (1897) I. L. R. 24 Calc. 418.
(6) (1902) I. L. R. 26 Mad. 450.
(7) (1905) I. L. R. 28 All. 112.
(8) (1911) I. L. R. 35 Bom. 470.

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brought under s. 539 of the Civil Procedure Code of 1882, though no relief can be given as against him by way of a decree in ejectment. Here the second defendant has denied that the property in dispute is trust property, and he is therefore a proper and necessary party to this suit.

GREAVES J. In this suit the plaintiffs claim to remove defendant No. 1 from the mutawalliship on the ground that he has committed a breach of trust by alienating a part of the trust property to defendant No. 2 who is alleged to have taken the property with the knowledge that it was trust property. Defendant No. 2 alleges that the property alienated is not trust property and that in any case he had no knowledge of any trust. A preliminary objection was taken on behalf of defendant No. 2 that he is not a necessary party and that he cannot be joined in the suit which is one under section 92 of the Civil Procedure Code. In support of this objection two cases are relied on, namely, *Budh Singh Dhudhuria* v. *Niradbaran Roy* (1) and *Badri Dass Mukim* v. *Chooni Lal Johurry* (2). With regard to both cases I am quite in agreement with them in so far as they decide that relief such as is asked here against defendant No 2, does not come within the purview of section 539 of the Civil Procedure Code, Act XIV of 1882, which is now represented by section 92 of the present Civil Procedure Code, but I see no reason why, having regard to the provisions of Order I, rule 3 of the present Civil Procedure Code, defendant No. 2 should not be made a party to the suit and, if my decision is against him, I see no reason why he should not in this suit be declared to be a trustee of the trust property and be directed to convey the property. I

(1) (1905) 2 C. L. J. 431, 434. (2) (1906) I. L. R. 33 Calc. 789, 805.

should add that I am fortified in the view that I have expressed by a consideration of the provisions of Order XVI, r. 4 of the English Procedure Rules: see *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers* (1) and the notes in the English Annual Practice for 1915, at p. 221. Order I, rule 3 of the Civil Procedure Code is very similar in terms, in fact almost identical with Order XVI, r. 4 of the English Procedure Rules and is probably founded thereon and consequently the opinions expressed in Order XVI, r. 4, by the English Judges may well be considered in construing the provisions of Order I, r. 3. I accordingly overrule the preliminary objection.

W. M. C.

Attorney for the plaintiff: *N. C. Dutt.*

Attorney for the defendant, Ghulam Mowlah: *H. C. Bannerjee.*

(1) [1910] 2 K. B. 354.

APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C J., Woodroffe and Mookerjee JJ.

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April 28.

CHAITRAM RAMBILAS

v.

BRIDHICHAND KESRICHAND.*

Arbitration—Bengal Chamber of Commerce, arbitration by—Arbitration Act (IX of 1899) s 14—Arbitration clause in a contract—Reference to an Association—Rules of an Association for the conduct of arbitration proceedings referred to it, whether imported into the contract and binding on the parties thereto.

Where a contract contains an arbitration clause by which it is agreed that any dispute arising out of the contract shall be referred to the arbitration of the Bengal Chamber of Commerce, the rules of the Association are imported into the contract and are binding on the parties.

Per JENKINS C.J. The decision in *Ganges Manufacturing Company, Ld.* v. *Indra Chand* (1) was binding on the learned Judge (of the Court of first instance) and should have been followed by him.

APPEAL by Chaitram Rambilas from the judgment of Imam J.

This appeal arose out of an application by the respondents, Bridhichand Kesrichand, for a Rule calling upon the appellants Chaitram Rambilas to show cause why an award of the Bengal Chamber of Commerce, dated the 29th August 1914, and filed in the High Court on the 20th November 1914, should not be set aside on the ground of misconduct and to stay certain proceedings in the Presidency Small Cause Court.

*Appeal from Original Civil, No. 16 of 1915.

(1) (1906) I. L. R 33 Calc. 1169.

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The facts, which are taken from the judgment of Imam, J., were as follows :—

By a contract, dated the 2nd October 1913, Bridhichand Kesrichand agreed to sell and Chaitram Rambilas agreed to purchase 500 bales of jute of a certain mark and quality, shipment within one month from date at Rs. 12 a maund to be delivered at the ghat of the buyers' mills. The contract contained an arbitration clause, which ran as follows: "Any dispute arising out of this contract shall be referred to the arbitration of the Bengal Chamber of Commerce, whose decision shall be accepted as final and binding on both parties to this contract."

In fulfilment of the contract the respondents, on the 11th and 13th October 1913, delivered to the appellants 1,200 half bales of jute in two lots of 551 and 649, respectively at the Central Jute Mills and the respondents received 90 p. c. of the price in cash. Thereafter a dispute arose between the parties as to the quality of the jute supplied. In April 1914, the appellants under the arbitration clause contained in the contract referred the dispute to the arbitration of the Bengal Chamber of Commerce. The Registrar of the Bengal Chamber of Commerce Tribunal of Arbitration thereupon called upon the respondents to submit a statement of their case. Some correspondence then passed between the respondents' attorneys and the Registrar, in the course of which the respondents stated that in their opinion the case was rather for a Court of law than for arbitration by the Chamber's Tribunal of Arbitration. Eventually, on the 14th May 1914, the respondents submitted to the Registrar a statement of their case, and at the same time they mentioned that they had no objection to put forward their claim before the Tribunal so long as evidence was taken, which was, according to their contention, most necessary.

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The arbitrators appointed by the Chamber of Commerce thereafter proceeded to adjudicate upon the case and gave an award in favour of the appellants.

The respondents asked that this award should be set aside on the grounds that the arbitrators had refused to allow them to adduce evidence to establish their case, and that they had not agreed to accept the rules of the Tribunal of Arbitration of the Chamber of Commerce as binding on them.

After setting out the facts as stated above, Imam J. set aside the award observing as follows:—

"On behalf of the respondents the authority of Mr. Justice Harington's decision in the *Ganges Manufacturing Company* v. *Indra Chand* (1) is cited. In that case the contract provided a similar arbitration clause and that learned Judge in dealing with it stated 'they chose to propose that their disputes should be disposed of by the Bengal Chamber of Commerce. They chose this Association. It is one of the duties of this Association to dispose of such disputes by arbitration according to its rules. Having offered to be bound by the decision of this Association, they cannot now be heard to say that they are not bound by the rules of the Tribunal of their choice.' While according all due weight and respect to that decision, I am not prepared to agree with it on this point. In the arbitration clause no mention of the rules has been made, and no assent to be governed by any procedure that the Chamber might choose to adopt has been signified. The rules of the Chamber empower the Tribunal to deal with a case unfettered as they think best; and no obligation has been cast upon them to examine witnesses, even if the parties wish it, or to conform to the ordinary methods of arbitration. Under the agreement the parties chose to have the Chamber to arbitrate upon any disputes between them, but they nowhere said that they consented to the exercise by the Chamber of those wide powers that the rules confer. In the absence of such a provision in the agreement, the Chamber cannot be credited with any higher powers than any other arbitrator. The decision of Mr. Justice Harington was cited before Mr. Justice Chaudhuri in *Nalin Chandra Saha* v. *Sinclair Murray & Co.** in support of a contention similar to the one pressed by the present respondents, and that learned Judge expressed his disagreement with the proposition. The refusal of the Tribunal to allow the petitioners to adduce evidence vitiates the award, and I accordingly set it aside. The respondents will pay the costs of this application."

(1) (1906) I. L. R. 33 Calc. 1169. * Unreported.

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JENKINS C.J.

From this judgment Chaitram Rambilas appealed.

Mr. N. N. Sircar and *Mr. H. C. Mazumdar*, for the appellants, contended that there had been no refusal on the part of the arbitrators to take evidence, and that the respondents had not made the case in their petition, that they were ignorant of the rules of the Bengal Chamber of Commerce or that they were not bound by those rules. They referred to the case of the *Ganges Manufacturing Company, Ld.*, v. *Indra Chand* (1) in support of their contention that the rules of the Chamber of Commerce were imported into the contract, and they also referred to *Benjamin* v. *Barnett* (2).

Mr. L. P. E. Pugh and *Mr. C. C. Ghose*, for the respondents. We rely upon two points (*a*) misconduct, and (*b*) our ignorance of the rules of the Chamber of Commerce, which are therefore not binding upon us. As to the first point, a refusal to hear evidence is misconduct, see Russell on Arbitration and Award, 9th Ed., pp. 148, 149. They also referred to *Harvey* v. *Shelton* (3). With regard to our second point, we cannot be bound by rules of which we are ignorant: *Perry* v. *Barnett* (4).

JENKINS C.J. This is an appeal from an order of Mr. Justice Imam made apparently under section 14 of the Indian Arbitration Act. There was an arbitration followed by an award. But it is alleged that there was misconduct on the part of the arbitrators; and it is on the ground of this misconduct that the application was made to the Court and succeeded before the learned Judge. The misconduct suggested was the failure to hear evidence. Whether there was that failure or not is a matter in dispute.

(1) (1906) I. L. R. 33 Calc. 1169.
(2) (1903) 8 Com. Cas. 244, 247.
(3) (1844) 7 Beav. 455, 462.
(4) (1885) 15 Q. B. D. 388.

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But the way in which the case was presented to the learned Judge and in which he understood it appears from this passage in the judgment: "The petitioners' complaint is that the arbitrators refused to allow them to adduce evidence to establish their contentions and proceeded with the arbitration according to the Rules of the Tribunal of Arbitration established by the Bengal Chamber of Commerce and not according to the law under the Indian Arbitration Act. The petitioners' contention is that the arbitration clause in the contract is merely an agreement to abide by the decision of the Chamber without accepting to be governed by the wide powers of that body as expressed in their rules." It is apparent therefore from this that it was admitted that the misconduct depended upon the alleged non-applicability of the rules governing an arbitration by the Bengal Chamber of Commerce. I cannot attribute any other meaning to the words of the judgment which I have just quoted.

The first question, therefore, which we have to consider is whether these rules were imported into the contract. Even without the assistance of any authority it appears to me that these rules were imported into the contract and that without such importation the contract would be insensible so far as it related to arbitration. For, it would involve the ridiculous position that every member of the Chamber of Commerce would have to sit on the arbitration. So that on the contract itself I should have felt no doubt. But apart from that there is a very careful judgment of Mr. Justice Harington in *Ganges Manufacturing Co., Ld.*, v. *Indra Chand* (1), delivered as far back as the 5th June 1906, where the contract was in the same terms as that with which we are now concerned.

(1) (1906) I. L. R. 33 Calc. 1169.

The learned Judge came to the conclusion which I have indicated as a correct view of the contract. That decision was certainly binding on the learned Judge and, according to my opinion, should have been followed by him. It may not be binding on us in the strict sense. But I think it is entitled to every respect and it agrees with the view I entertain on the subject.

Therefore it appears to me that on the basis on which this case was argued and conducted before Mr. Justice Imam there was no misconduct, because the rules of the Chamber of Commerce were applicable.

It appears to us unnecessary to consider other matters. But I cannot refrain from pointing to the fact that the application, verified and supported in the way it is, forms a most unsatisfactory basis on which to claim relief under section 14 of the Indian Arbitration Act. It is so unsatisfactory that I do not think that there should be a remand. In my opinion the appeal should be allowed and the application dismissed. The respondent should pay the costs of the hearing before Mr. Justice Imam and before this Court.

WOODROFFE J. I agree that the appeal should be allowed. The fact that the Chamber of Commerce has framed rules for its arbitration is, I should have thought, well known to every trader in Calcutta, particularly to those accepting contracts stipulating for arbitration by the Chamber of Commerce. However this may be, I entirely agree with the judgment of Mr. Justice Harington in the case referred to by the Chief Justice that if a party to a contract has agreed to submit to an arbitration of the Bengal Chamber of

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Commerce he must be held to be bound by the rules of that Chamber.

MOOKERJEE J. I agree with the Chief Justice.

Appeal allowed.

Attorneys for the appellant: *Manuel & Agarwallah.*

Attorneys for the respondents: *Pugh & Co.*

W. M. C.

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

1914

Aug. 4.

PROKASH CHANDRA GHOSE

v.

HASAN BANU BIBI.*

Mortgage—Interest—Loss of part of security by acquisition of mortgaged land—Mortgagee applying to Land-Acquisition Judge for return of mortgage money (out of the compensation money) within term, whether entitled to interest for the whole term—Land Acquisition Act (I of 1894) ss. 18, 30.

If the mortgagee makes a demand for payment within the term, and the mortgagor complies, the mortgagee cannot insist upon payment of interest for the whole of the term.

Letts v. *Hutchins* (1), *In re Moss* (2), *Smith* v. *Smith* (3) referred to.

Where the mortgagee has given notice requiring payment within the term, he cannot withdraw it without the consent of the mortgagor.

Santley v. *Wilde* (4) followed.

* Appeal from Original Decree, No. 210 of 1913, against the decree of H. P. Duval, District Judge of 24-Parganas, dated April 26, 1913.

(1) (1871) L. R. 13 Eq. 176.
(2) (1885) 31 Ch. D. 90.
(3) [1891] 3 Ch. 550.
(4) [1899] 1 Ch. 747; 2 Ch. 474.

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Where the mortgagor agreed to keep the money for one year from 28th September 1912 on condition that the land should remain as security for the loan during the term, but one of the properties given as security had been acquired (the mortgagee probably having no knowledge thereof), and on the 14th October 1912 the mortgagor applied to the Land-Acquisition Deputy Collector that the money due under the mortgage (including one full year's interest) might be paid to him out of the compensation money, and the mortgagor consented :

Held, that, as the contract between the parties could not be performed according to its letter by reason of circumstances beyond their control, the mortgagor was not bound to pay interest beyond the period of one month (as admitted by him).

Bakhtawar Begam v. *Husaini Khanum* (1) explained.

APPEAL by the mortgagee, Prokash Chandra Ghose (petitioner), against an award in an apportionment case under the Land Acquisition Act.

On the 28th September 1912, one Hasan Banu Bibi mortgaged four properties in Calcutta (including her demarcated and partitioned share in premises No. 16, Muhammad Crescent 2nd Lane) to one Prokash Chunder Ghose for Rs. 5,000 interest being payable monthly at the rate of 12 per cent. per annum, the mortgage in consequence not being redeemable till 28th September 1913. The statutory declaration for the acquisition of premises No. 16, Muhammad Crescent 2nd Lane, had been published on the 28th February 1912 and the award of the Collector was made on the 20th September 1912, and apparently the mortgagee had no knowledge of these proceedings under the Land Acquisition Act. On the 14th October 1912, the mortgagee applied to the Land Acquisition Deputy Collector for payment to him (out of the compensation money) of Rs. 5,000 as principal together with Rs. 600 as interest thereon for one year, the mortgagee thus wanting a return of the mortgagee money within the first month only, together with interest for the full term of one

(1) (1914) I. L. R. 36 All. 195.

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year. The mortgagor consented to the repayment of the principal amount but objected to the payment of one whole year's interest as, within one month of the mortgage and of the award, the mortgagee had prevented the mortgagor from enjoying the Rs. 5,000 by pressing the Land-Acquisition Deputy Collector to stop payment to her of this sum. In fact the latter stopped payment to the mortgagor of the whole Rs. 5,600 out of the compensation money. No objection was taken by either of the parties as to whether this question regarding the payment of interest for the whole term stipulated could be considered in the course of the land acquisition proceeding. On 13th January 1913 the Land-Acquisition Deputy Collector referred this dispute (as to apportionment of compensation) to the Court. In his judgment dated 26th April 1913, Mr. H. P. Duval, the Special Land Acquisition Judge, held that the mortgagee was in equity entitled to only one month's interest or Rs. 5,058 only out of the sum in deposit, as he could have called upon the mortgagor to give additional security under section 68 of the Transfer of Property Act, but preferred to follow the money in the Land Acquisition Court and thus realise his dues (with the consent of the mortgagor) before the time fixed.

Hence the mortgagee preferred this appeal to the High Court claiming an additional sum of Rs. 550 as interest for the remaining eleven months.

Babu Baidya Nath Dutt (with him *Babu Tarakeswar Pal Chowdhury*, *Babu Mohini Nath Bose*, and *Babu Bhupendra K. Ghose*), for the appellant. The mortgage having been for a term of one year ending on 28th September 1913, the acquisition (within the term) of the land given as part security gives rise to no equity which supersedes the covenant to pay interest up to that date. Under the mortgage contract, the mortgagee is entitled to interest for a whole year and the

mortgagor is bound to pay that sum even though the mortgage money is repaid on an earlier date: *Bakhtawar Begam* v. *Husaini Khanum* (1). Further, I rely on the provisions of sections 108 and 114 of the Land Clauses Act, 1845, which relate to the acquisition of mortgaged properties in England.

Babu Probodh Chandra Chatterjee, for the respondent. The appellant gave me the use of his money for one year and I, therefore, agreed to pay him interest for that period, but as he has subsequently deprived me of its use by wanting the return of the mortgage money within the term, he is not entitled to interest for the full period of one year. *Bakhtawar Begam's Case* (1) is an authority only for the proposition that ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. Here the contract between the parties cannot be performed according to its letter, as the land has been acquired, and the mortgagee has thus lost a part of his security, and though he could have applied for additional security under section 68 of the Transfer of Property Act, he immediately applied to the Land-Acquisition Collector for the withdrawal of the money. So he is not entitled either by law or in equity to more than one month's interest.

Babu Baidya Nath Dutt, in reply.

MOOKERJEE AND BEACHCROFT JJ. This appeal is directed against an award in an apportionment case under the Land Acquisition Act. The facts necessary for the decision of the question of law raised before us may be briefly stated.

On the 28th September 1912, the appellant advanced

(1) (1914) I. L. R. 36 All. 195.

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Rs. 5,000 to the respondent on mortgage of four properties in Calcutta. The mortgage money was repayable on the 28th September 1913, and carried interest at 12 per cent. per annum. One of the properties given by way of security was the subject matter of a proceeding under the Land Acquisition Act. The statutory declaration for the acquisition of the land had been published on the 2nd February 1912 and the award of the Collector made on the 20th September 1912. The record does not show whether the mortgagee was, at the time when he accepted the security, aware of the proceedings under the Land Acquisition Act; it is probable that he had no knowledge thereof, and the case has been tried on that assumption. On the 14th October 1912, the mortgagee applied to the Land-Acquisition Judge that the money due under his mortgage, namely, Rs. 5,000 as principal and Rs. 600 as interest thereon for one year, might be paid to him out of the compensation money. The mortgagee in substance wanted a return of the mortgage money together with interest for the full period of one year. The mortgagor did not contest the claim for the principal amount, but urged that she was not liable to pay interest for one year. It is needless to consider whether this question could have been considered in the course of the land acquisition proceeding; for no objection was taken by either of the parties, and, it is in the interest of both, that the question in controversy between them should now be finally settled. The Land Acquisition Judge has held that the mortgagee was entitled to interest only for one month, and has accordingly ordered the payment of Rs. 5,050 to him. The mortgagee is not satisfied and has appealed to this Court with a view to obtain an additional sum of Rs. 550 as interest for eleven months on the loan.

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On behalf of the appellant it has been argued that, under the mortgage contract, he was entitled to interest for one year and that the mortgagor is bound to pay that sum even though the mortgage money is repaid on an earlier date. In support of this contention, reliance has been placed upon the decision of the Judicial Committee in the case *Bakhtawar Begam* v. *Husaini Khanum* (1). That case, however, is an authority only for the proposition that, ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. This principle is of no assistance to the appellant. It need not be disputed that the mortgagor is not entitled to redeem before the debt becomes due; and it was held in *Brown* v. *Cole* (2) that he is not entitled to redeem before the debt becomes due, even though he may offer to pay interest for the whole period: see also *Burrough* v. *Cranston* (3). But in the case before us, the contract between the parties cannot be performed according to its letter, by reason of circumstances beyond the control of the parties. No doubt, the mortgagor agreed to keep the money for one year: but that was on condition that the land should remain security for the loan during the term. The land, however, has been acquired and the mortgagee has lost a part of his security. As soon as this happened, the mortgagee applied for return of the mortgage money. The question consequently arises whether he is entitled to interest thereon for the whole of the term. We are clearly of opinion that the claim is unjust.

It is well settled that if the mortgagee makes a

(1) (1914) I. L. R. 36 All. 195. (2) (1845) 14 Simon 427.
(3) (1840) 2 Ir. Eq. R. 203.

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demand for payment within the term, and the mortgagor complies, the mortgagee cannot insist upon payment of interest for the whole of the term. Reference may, in this connection, be made to the cases of *Letts* v. *Hutchins* (1), *In re Moss* (2), and *Smith* v. *Smith* (3). Indeed, where the mortgagee has given notice requiring payment within the term, he cannot withdraw it without the consent of the mortgagor: *Santley* v. *Wilde* (4).

In the present case, the mortgagee might have called upon the mortgagor, under section 68 of the Transfer of Property Act, to give additional security. He did not adopt that course and claimed a refund of the money, to which the mortgagor consented. Under these circumstances, it is plain that the mortgagor was not bound to pay interest beyond the period of one month. Reliance has finally been placed upon the provisions of sections 108 and 114 of the Land Clauses Act, 1845, relating to the acquisition of mortgaged properties. It is sufficient to observe that the Indian Legistature has not framed similar provisions applicable to this country.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

G. S. *Appeal dismissed.*

(1) (1871) L. R. 13 Eq. 176.
(2) (1885) 31 Ch. D. 90.
(3) [1891] 3 Ch. 550.
(4) [1899] 1 Ch. 747 ; 2 Ch. 474.

APPELLATE CRIMINAL.

Before Fletcher and Beachcroft JJ.

HARSHA NATH CHATTERJEE

v.

EMPEROR.*

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Nov. 12.

Misjoinder of Charges—Joint trial for offences under s. 120B of the Penal Code and ss. 19 (f), 20 of the Arms Act, committed in pursuance of the object of the conspiracy—Identity of transaction—Criminal Procedure Code (Act V of 1898) s. 239—Joint possession of arms—Mere keeping of fire-arms not an offence "Fire-arms" whether inclusive of parts of the same—Arms Act (XI of 1878) ss. 4, 5, 14, 19(a) (f), 20—Criminal conspiracy, proof of—Punishment when act contemplated not done—Penal Code (Act XLV of 1860) ss. 109, 116, 120B.

A charge of criminal conspiracy to manufacture arms, under s. 120B of the Penal Code read with section 19(*a*) of the Arms Act (XI of 1878), may be tried jointly with charges of offences under ss. 19 (*f*) and 20 of the latter Act committed in pursuance of the object of the conspiracy.

As long as the conspiracy continues the transaction which began with the forming of the common intention continues, and the offences under ss. 19 (*f*) and 20 of the Arms Act are committed in the course of the same transaction.

Legal Remembrancer, Bengal v. *Mon Mohan Roy* (1) followed.

Where two persons rented a house and lived in it, and parts of arms were found in one of the rooms :—

Held, that both being in joint occupation of the house, were in joint possession of the articles so found.

The word "fire-arms" in s. 14, read with the meaning of "arms" in s. 4 of the Arms Act, includes parts of fire-arms. "Fire-arms" means only arms fired by gunpowder or other explosives.

Ahmed Hossein v. *Queen-Empress* (2), *Emperor* v. *Dhan Singh* (3) followed.

* Criminal Appeals Nos. 591 and 592 of 1914, against the order of E. Panton, Additional Sessions Judge of 24-Parganas, dated June 15, 1914.

(1) (1914) 19 C. W. N. 672 ; 21 C. L. J. 195. (2) (1900) I. L. R. 27 Calc. 692. (3) (1907) 5 Cr. L. J. 435 ; 3 N. L. R. 53.

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The offence under ss. 5 and 19 (*a*) of the Arms Act is not a mere keeping of arms, but a keeping of the same for sale.

In cases of conspiracy, the agreement between the conspirators cannot generally be directly proved, but only inferred from the established facts of the case. Where two persons took a house in which a considerable number of pieces of fire-arms was found with tools and implements, and work had been actually done to some of the parts of fire-arms, the Court may and ought to infer a conspiracy to manufacture arms.

Per CURIAM: Where there is only a conspiracy to manufacture arms, without an actual manufacture, the sentence should be imposed under s. 120B of the Penal Code read with s. 19 (*a*) of the Arms Act and s. 116 of the Penal Code, and the maximum term of imprisonment awardable under these sections is 9 months' rigorous imprisonment.

Per BEACHCROFT J. The punishment awardable under s. 120B of the Penal Code varies according as the offence has or has not been committed in consequence of the conspiracy. If an offence has been committed, the punishment is that provided by s. 109 of the Penal Code, though, strictly speaking, there should not be a conviction in such cases of conspiracy but of abetment. If it has not been committed, the punishment is governed by s. 116 of the Penal Code.

APPEAL by Harsha Nath Chatterjee and another.

The appellants were tried before the Additional Sessions Judge of the 24-Parganas with the aid of Assessors charged under (i) s. 19(*f*) of the Arms Act (XI of 1878); (ii) s. 20 of the same; and (iii) s. 120B of the Indian Penal Code. The Assessors found them guilty of offences under the Arms Act, but acquitted them of criminal conspiracy. The Sessions Judge, however, convicted them of all the three offences, and sentenced them to one year's rigorous imprisonment under the first, and to three years' rigorous imprisonment under the second and third charges, the sentences running concurrently.

On the 2nd December 1913, the two appellants went to the house of one Bhutnath Sil, a travelling agent of Messrs. Osler & Co., who lived in Victoria Road, Baranagore, for the purpose of renting a house in the same road belonging to one Nanda Lal De, the brother-

in-law of Bhutnath. The appellant, Khagendra, represented to Bhutnath that they were students of the Medical College, and gave his name as Khitindra Nath Roy. He paid Rs. 7 rent in advance and received a *kutcha* receipt for the sum. The balance, Rs. 4, was paid subsequently, and a fresh receipt for the whole amount was given by N. L. De, the *kutcha* receipt being returned to him. Another month's rent was also paid and a receipt given for the same. The two accused lived in the house. It appeared that they used to keep the door and windows of the house abutting the road constantly closed.

On the 25th January 1914, Mr. Denham, Deputy Commissioner of Police, received certain information in consequence of which he proceeded to Baranagore with Mr. Buller, Inspector-General of Police, Mr. Lowman and other police officers. They reached the house in Victoria Road early next morning, burst open the door and entered the premises. Harsha Nath was found in the room abutting on the road and was arrested. Two search witnesses were called from the road and the police officers proceeded to search the place. In a room on the north of the court-yard were found the two rent receipts and, among other articles, certain parts of two double-barrelled breech-loading guns, *viz.*, double-barrelled breech-loader action, trigger guard, trigger plate with triggers, trigger plate screw, double bolt part of a gun action, top lever part of a gun, barrel pin, guard or fire-end screws, guard pin, parts of a top lever spring broken, nipples of a breech-loader and another complete gun action without the stock and locks. A search list was drawn up and the above were entered therein as items IX to XI, XIV to XVI, XIX, XX, XXII to XXXI. In addition, implements for the repairs of guns were also found in the room.

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Constables in plain clothes were then stationed in the vicinity of the house with instructions to arrest every one who entered. The first to do so was one Chinibas Neka, a waterman, who used to supply the inmates of the house daily with water. At 10 or 10-30 P.M., Khagendra was arrested as he entered the house. On being questioned by Mr. Denham next morning, he explained that he had gone to the house by invitation to see a friend named Dinobandhu Bhattacharji.

After a preliminary inquiry held by Babu P. C. Chatterjee, Deputy Magistrate, Alipore, the accused were committed to the Sessions on 4th March 1914. The trial came on before Mr. Panton, Additional Sessions Judge, with the aid of two assessors, on 4th June. The appellants were charged as follows—

First, that you, on or about the 26th January 1914, at Baranagore, had in your possession and under your control the arms Exhibits IX to XI, XIV to XVI, XIX, XX, XXII to XXXI, in contravention of s. 14 of the Arms Act . . . an offence punishable under s. 19 (f) of the Act.

Secondly, that you, on or about the 26th January 1914, at Baranagore, had in your possession and control the arms enumerated above in contravention of s. 14 of the Arms Act in such manner as to indicate an intention that such act might not be known to any public servant . . . an offence punishable under s. 20 of the Act.

Thirdly, that you, during a period from the 2nd December 1913 to 26th January 1914, conspired to manufacture or keep fire-arms in contravention of the provisions of s. 5 of the Arms Act, and thereby committed an offence under s. 120B of the Penal Code read with s. 19 (a) of the Arms Act.

The accused, who were convicted and sentenced as stated above, appealed to the High Court.

Mr. N. Sen, *Mr. S. C. Roy*, and *Babu Khitish Chandra Neogi*, for the accused, in appeal No. 591.

Mr. S. C. Roy, and *Babu Ramani Mohan Chatterjee*, for the accused, in appeal No. 592.

The Advocate-General (*Mr. G. H. B. Kenrick, K.C.*), *Mr. N. Gupta*, *Babu Hemendra Nath Mitter*, and

Babu Nirode Chunder Chatterjee, for the Crown in both cases.

Cur. adv. vult.

FLETCHER J. These are two appeals by the two accused against their conviction and the sentences passed on them by the learned Additional Sessions Judge of the 24-Parganas.

The two accused were charged before the learned Sessions Judge with having committed offences under three heads. The first charge against the accused was that they had in their possession or under their control certain arms in contravention of the provisions of section 14 of the Indian Arms Act (Act XI of 1878). The second charge was that they had in their possession or control such arms in contravention of section 14 of the Indian Arms Act in such a manner as to indicate the intention that such act might not be known to any public servant. The third charge was that during a period from the 2nd of December 1913 to the 26th January 1914, they conspired to manufacture or keep fire-arms in contravention of the provisions of section 5 of the Indian Arms Act. The two Assessors who assisted the learned Judge at the trial, were of opinion that both the accused were guilty of the offences charged against them under the first two charges, but that they were not guilty of the offence charged under the third charge. The learned Judge, however, convicted the two accused under all the three charges and sentenced each of them to undergo the following terms of imprisonment, namely, under the first charge one year's rigorous imprisonment, and under the second and third charges three years rigorous imprisonment, the sentences to run concurrently.

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The facts of the case lie in a narrow compass. On the 25th of January last, Mr. Denham, Deputy Commissioner of Police, received certain information. In consequence of this information Mr. Denham accompanied by the Inspector-General of Police and certain other superior officers proceeded to a one-storied house in Victoria Road, Baranagore. Early in the morning of the 26th January they arrived at the house. The door of the house having been forced the party entered. The first accused Harsha Nath, *alias* Moti Lal, was found in the room that abuts on the road. In a room on the other side of the courtyard, portions of fire-arms and certain tools were found. Two receipts for the rent of the house were also found. The accused Harsha Nath was arrested. He declined to make any statement with reference to the things found in the house. A search list was then drawn up in the presence of witnesses and the party left. Constables in plain clothes were posted at the house with instructions to arrest any one who might come to the house. The first person to do so was the water-carrier, Chinibas Neka, who has been called as a witness for the prosecution. About 10 or 10-30 of the same night—the accused Khagendra in his statement fixes the hour as 8 or 8-30—the accused Khagendra arrived at the house and was arrested. The first question that we have to decide is what was the connection of the two accused with the house at Baranagore.

That they have some connection with the house is not denied, nor could it be since both of them were arrested there. The case for the prosecution is that on the 2nd of December last the two accused rented from the witness, Bhut Nath Sil, this house which is the property of his brother-in-law Nanda Lal De. The accused represented that they were students at the Calcutta Medical College and that owing to the high

prices ruling in Calcutta they found it convenient to live at Baranagore. The accused Khagendra gave the name of Khitindra Nath Roy. The rent of the house was fixed at Rs. 11 per mensem, and on the 2nd of December Khagendra paid Rs. 7 on account of the rent for that month and received the *kutcha* receipt Ex. 11. The balance of the rent for that month was subsequently paid and a formal receipt Ex. 2 was handed over. Another month's rent was subsequently paid and the receipt Ex. 1 was given. The *kutcha* receipt is said to have been returned by Khagendra when the formal receipt Ex. 2 was given to him. The two receipts Exs. 1 and 2 were found at the search on the 26th of January. The witnesses who depose to this part of the case are first Bhutnath Sil. He is employed as travelling agent of Messrs. Osler & Co. His pay is Rs. 90 per mensem, plus a commission which amounts to Rs. 1,000 to Rs. 1,500 per annum. He is, therefore, apparently a man of respectability. The next witness is Bhutnath's son, Bhupendra, a lad of 14 years of age, and the third witness is Nanda Lal De, a sub-engineer employed in the Public Works Department and brother-in-law to Bhutnath Sil. He is also apparently a man of respectability. The house at Baranagore belongs to Nanda Lal De but is let out and looked after by Bhutnath Sil who or whose family receives the rent.

The witness Bhutnath Sil states that on the 2nd of December last two men came to him and after certain negotiations took the house at a rent of Rs. 11 per mensem. A payment of Rs. 7 was made on account of the first month's rent and the *kutcha* receipt Ex. 11 was given. The man who carried on the negotiations gave the name of Khitindra Nath Roy. The witness is positive that this man is the accused Khagendra and he believes, although he is not certain,

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that the man who was with him is the other accused Harsha Nath. On that night Bhutnath left Calcutta for the United Provinces and did not return until the 28th of February on which day he gave his evidence before the Enquiring Magistrate. Counsel has attempted to throw doubt on the evidence of Bhutnath on the ground that before his return to Calcutta he was interviewed by a police officer. But in the ordinary course if the police intended to avail themselves of the evidence of Bhutnath they would have to interview him before calling him as a witness in order to find out what he would be able to prove. I see no reason to doubt the evidence of Bhutnath.

The boy Bhupendra states that on some date in December Khagendra came and paid to him the balance of the rent for that month. The witness states that he handed to Khagendra Ex. 2 and received in return the receipt Ex. 11. Further, this witness states that in January the two accused came to him and paid the rent for that month and received the receipt Ex. 1. Bhupendra at a subsequent date identified the two accused at the Alipore Jail. This identification took place in the presence of a Magistrate and it is not suggested that the witness did not identify the accused. The witness states that he did not see the accused at the thana previously. The Sub-Inspector Dwijendra Nath Adhya says he does not remember whether Bhupendra saw the accused at the thana. But even if Bhupendra's identification cannot be wholly relied upon, there is a body of evidence that shows conclusively that the house was rented and occupied by both the accused.

Nanda Lal De was called chiefly to prove the receipts for rent. The two receipts Exs. 1 and 2 were found at the search. Before the learned Judge a good deal of the cross-examination of some of the witnesses

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was directed to show that the name Khitindra Nath Roy appearing on these two receipts was written in a different handwriting and with a different ink to the rest of the writing on the receipts. Mr. Denham, however, is positive that these names appeared there when the receipts were found on the search and the search list supports his evidence.

Then the evidence as to the occupation of the house shows clearly that these two accused were in occupation of the same.

The witness Chinibas Neka states that he took water to the house every day at 9 o'clock in the morning. He used to shake the chain and call out, when one of the accused would come and open the door for him. On his leaving, the door would be closed again.

The witness Bagwan Biswal, who is a *mali* in a garden opposite the house, states that he has seen Khagendra both entering and leaving the house. He further states that the doors and windows of the house were always kept shut. The evidence of Jagabandu Das which was given before the Committing Magistrate states that the windows and doors always remained shut. He further states that two men lived in the house in the latter part of Aghran and they did not mix or talk with the neighbours. Jagabandu died before the trial took place, but his deposition before the Committing Magistrate was put in.

As against this body of evidence showing the taking and occupation of the house by the two accused there are the statements of the accused. The accused Khagendra, in a written statement that he filed before the learned Judge, stated that one night about 15 or 16 days before his arrest he met one Dinabandhu Bhattacharjee who, he says, was with him at the Dacca Imperial Seminary in the Municipal Market. He

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states he asked Dinabandhu where he lived and that Dinabandhu said he lived at Baranagore where he worked for a contractor. On Dinabandhu asking a similar question of Khagendra the latter stated that he had no fixed place of abode as the police were trying to connect him with the Barisal conspiracy case. Dinabandhu then asked Khagendra if he would like to come with him for a day or two, and he said he would come next day. Next day accompanied by Dinabandhu he went to the house at Baranagore where he saw the other accused. He left after staying there two or three hours. On the 26th of January he returned to Baranagore at 8 or 8-30 A.M. and was arrested and taken to the police-station. This story is wholly improbable and does not cast any doubt on the direct evidence connecting Khagendra with the house. No trace of this Dinabandhu has been found, and there can be little doubt that he does not exist. Further the statement of Khagendra that he was in a public place like the Municipal Market when the police were searching for him is highly improbable. On the other hand, his statement that the police were searching for him may furnish a good reason why he should take this house at Baranagore to escape from the police. The evidence shows that he was successful in so doing between the 2nd of December and the 26th of January.

The statement of the accused Harsha Nath is that he came to Calcutta about the end of December to seek employment. He used to walk near the Gole Dighi and having a fine voice he used to sing. In this way he made many acquaintances including the aforesaid Dinabandhu. Dinabandhu hearing of the position of Harsha Nath forthwith invited him to come and stay in his house in Baranagore. Harsha Nath says he went to stay there on the 5th or 6th January. Some two or three days before his arrest Harsha Nath, says

Dinabandhu, left for "somewhere" on business expecting to return in three or four days. It is remarkable that Harsha Nath who was, according to his story, on terms of intimacy with Dinabandhu did not know the "somewhere" to which Dinabandhu had gone on business.

The whole story of this accused, commencing with Dinabandhu who is alleged to be a resident of and employed at Baranagore taking his walks in College Square, Calcutta, down to Dinabandhu's departure for "somewhere' two or three days before Harsha Nath's arrest is manifestly untrue.

The evidence leaves no doubt in my mind that the two accused rented this house on the 2nd of December, and that they were jointly in possession of it, on the day of their arrest, *viz.* the 26th of January last.

It is not open to doubt that the tools and portions of fire-arms were found in the house at the time of the search. But it has been argued that the evidence does not establish in whose possession such articles were. Counsel has argued that there is some rule of law that in circumstances such as the present the Court cannot impute possession to either of the accused. There may, however, be joint possession of the articles and the fact as to whose possession the articles were in at the date of the search must be decided on the evidence in the case.

Now, the evidence establishes that both the accused were in joint possession and occupation of the house. They took the house falsely representing that they were medical students. The evidence on behalf of the prosecution also proves that during the occupation and possession of the accused, the doors and windows of the house were always kept closed. Why should the doors and windows of the house be kept closed? And can any one doubt that in that state of things

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both the inmates of the house must have been fully aware of what was going on in the house? The evidence leaves no doubt in my mind that both the accused were in fact in possession of these articles.

I will now proceed to consider the case under the three charges that have been framed against the accused. But before doing so I will dispose of an objection raised by counsel as to the whole trial. It was argued that the whole trial was illegal owing to misjoinder of charges. That, however, clearly is not so. The offences charged in this case were committed in the same transaction and section 239 of the Code of Criminal Procedure authorises such charges to be tried together. If authority be wanted for the course adopted in the present case the very recent judgment of this Court in *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Mon Mohan Roy* (1).

Coming then to the particular charges, the first charge against the accused is framed under section 19 (*f*) of the Indian Arms Act, namely, of having in their possession or under their control arms in contravention of the provisions of section 14 of the Act. The arms of which section 14 prohibits the possession without a license are "fire-arms." Section 4 of the Act says that the word "arms" as used in the Act shall include "parts of arms." That being so, unless there is something repugnant in the subject or context, wherever the word "arms" occurs in the Act it has got to be read as including "parts of arms". Moreover, by section 4 of the Act the words "arms" also includes "fire-arms." That being so, it seems to me obvious that the word "fire-arms" as used in section 14 includes parts of the "fire-arms."

(1) (1914) 19 C. W. N. 672 ; 21 C L. J. 195.

Section 4 clearly means that the whole includes the part, and when the Act deals with a particular class of arms such as fire-arms the section means that parts of fire-arms are included in the word "fire-arms." The word "fire-arms" only means 'arms that are fired by means of gunpowder or other explosive.'

If section 14 prohibits the possession of arms that are fired by means of gunpowder or other explosive then clearly, having regard to section 4, the possession of parts of such arms is prohibited. That the possession of parts of fire-arms is prohibited by section 14, was decided by this Court in the case of *Ahmed Hossein* v. *Queen Empress* (1). A similar view was also taken by the Court of the Judicial Commissioner for the Central Provinces in the case of *Emperor* v. *Dhan Singh* (2).

In my opinion the learned Judge rightly convicted both the accused of being in possession of fire-arms in contravention of section 14 of the Act. The second charge against the accused was one of being in possession of fire-arms in contravention of the provisions of section 14 in such manner as to indicate an intention that such act may not be known to any public servant. Under the provisions of section 20 of the Act, this constitutes a different offence to that mentioned in section 19 (*f*). The only additional element necessary to constitute an offence under section 20 is that the possession should be in such manner as to indicate an intention that such act may not be known to any public servant. The evidence of concealment in the present case is clear and conclusive. The evidence proves that the two accused falsely representing themselves as medical students took the house at Baranagore and that the accused Khagendra gave a

(1) (1900) I. L. R. 27 Calc. 692. (2) (1907) 5 Cr. L. J. 435; 3 N. L. R. 53.

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false name. Further, the door and windows of the house were kept closed and also a very important fact—the accused Khagendra was wanted by the Police and, therefore, would wish to conceal himself and what he was doing. On this evidence an offence under section 20 is proved against both the accused. The third charge against the accused was one of conspiring to manufacture or keep fire-arms punishable under section 120B of the Indian Penal Code read with section 19 (*a*) of the Indian Arms Act. The learned Judge has convicted both the accused of being parties to a conspiracy both to manufacture and keep arms. The learned Judge, however, is clearly wrong in treating the keeping of arms as an offence under section 19(*a*) of the Indian Arms Act. The offence is keeping for sale not keeping only. Does then the evidence prove a conspiracy to manufacture arms? Now, in cases of conspiracy the agreement between the conspirators cannot generally be directly proved but only inferred from other facts proved in the case. The facts proved in this case leave no doubt that such a conspiracy to manufacture arms existed between the two accused. First, there is the taking of the house. Next, the finding of a considerable number of pieces of fire-arms on the premises. To what use were these articles to be put? Then there is the fact of the finding of the tools at the premises. The evidence also shows that there is reason to believe that work had actually been done to some of the portions of fire-arms found at the search. From these facts the Court can and ought to infer that the two accused had conspired together to manufacture arms. On this charge the learned Judge sentenced each of the accused to undergo 3 years' rigorous imprisonment. That sentence, however, appears to be illegal. Section 120 B of the Indian

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Penal Code provides "that the accused in a case of criminal conspiracy shall be punished in the same manner as if he had abetted such offence." The learned Judge found that there was only a conspiracy to manufacture without an actual manufacture. The learned Judge has, however, sentenced the accused under the 3rd charge on the footing that the punishment was provided for by section 109 of the Indian Penal Code. But in that view the punishment for a conspirator is much more severe than the punishment for an abettor. Section 120B provides that they shall be punished the same. The sentence on the accused on the third charge ought, on the findings made by the learned Judge, to have been imposed under section 120B of the Indian Penal Code read with section 19(*a*) of the Indian Arms Act and section 116 of the Indian Penal Code. Under these sections the maximum sentence that can be imposed on the accused under the 3rd charge is one of nine months' rigorous imprisonment. I think we ought, therefore, to reduce the sentence passed on each of the accused under the third charge to one of nine months' rigorous imprisonment. I see no reason to interfere with the sentences passed under the other two charges. The two appeals will, therefore, subject to the reduction of the sentences passed under the third charge, be dismissed.

BEACHCROFT J. I agree. As I was a member of the Bench which decided *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Mon Mohan Roy* (1), it is perhaps sufficient to say that nothing that I have heard in argument in this case leads me to alter the opinion which I then formed as to the legality of trying together charges of conspiracy and of offences

(1) (1914) 19 C. W. N. 672 ; 21 C. L. J. 195.

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BEACHCROFT J.

committed in carrying out the object of the conspiracy. But it will be as well to indicate shortly the line of argument taken and the fallacy which underlies it.

The argument was that the possession of fire-arms is a totally distinct offence from the offence of conspiracy to manufacture arms, and as the offence of conspiracy is complete so soon as the persons conspiring have formed a common intention, the two offences cannot be said to have been committed in the same transaction. The fallacy in this argument is that it assumes that the transaction is complete as soon as an offence is committed, in other words, that the term transaction is synonymous with the term "offence." It is clear that, so long as the conspiracy continued, the transaction, which began with the forming of the common intention, continued, and the first two offences charged were committed in the course of this transaction.

The punishment that may be awarded on a conviction under section 120B, seems to vary according as the offence has or has not been committed in consequence of the conspiracy. If an offence has been committed the punishment is provided by section 109 of the Indian Penal Code, if an offence has not been committed punishment is limited to the extent provided by section 116. Perhaps, strictly speaking, in the former case there should not be a conviction for conspiracy but for the abetment of the offence, for conspiracy followed by an act done to carry out the purpose of the conspiracy amounts to abetment. In the present case there has been no finding by the Judge, nor can it on the evidence be found as a fact that the offence was committed. The sentence that can be imposed is, therefore, that provided by section 116.

E. H. M.

APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C.J, Woodroffe and Mookerjee JJ

MARSHALL

v.

GRANDHI VENKATA RATNAM.*

1915

April 28.

Contempt of Court—Practice—Appeal—Assisting in contempt—Procedure.

Where the prohibitory injunction on the defendant firm made no mention of M, an assistant, or of servants and agents, but the notice of motion for committal for breach thereof was upon M who did nothing after service on him of the injunction.

Held, that the notice of motion was erroneous, and the procedure which had been adopted was misconceived: the proceedings against M, if any, should have been for *assisting* in a contempt of Court.

Held, also, (on the merits) that there had been no contempt or participation in contempt on M's part, as all that he did had been done prior to the injunction.

APPEAL by John Innes Marshall, an assistant in the firm of J. F. Kendrew & Co., the defendants, from the judgment of Greaves J, dated 31st March 1915.

The facts of the proceedings for injunction and for committal for contempt for breach thereof, out of which this appeal arises, appear fully from the following judgment of Greaves J., dated 31st March 1915:—

"The notice of motion in this case is directed to one J. I. Marshall, who is in the employ of the defendant firm, and it asks that he shall stand committed to the Presidency Jail for having committed a breach of an injunction granted by me on the 20th March instant, *restraining the defendant firm, their servants and agents* (I am here quoting the words of the motion) from disposing of, selling, or dealing in any manner with, the goods referred to in the plaint herein over Tuesday, the 23rd of March 1915

* Appeal from Original Civil No. 30 of 1915.

1915

MARSHALL v. GRANDHI VENKATA RATNAM.

and for an order on J. I. Marshall to pay to the plaintiff his costs of and incidental to this application. The notice of motion is dated 26th March 1915 and was duly served on Mr. Marshall.

This application arises under the following circumstances :—

On the 30th of January 1914, a contract was entered into between the plaintiff (Grandhi Vankata Ratnam) and the defendants (J. F. Kendrew & Co.) for the sale of 500 cases of matches. Certain of the cases were delivered between the months of March and December 1914, but on that day certain cases still remained undelivered. On the 17th of March of this year, the plaintiff received information to the effect that another consignment of matches of 75 cases marked with the plaintiff's name had arrived in Calcutta and that the defendant firm was trying to dispose of them to somebody other than the plaintiff. Thereupon interviews took place between the defendant firm and the plaintiff's son and the defendant firm expressed their willingness to deliver the goods at a certain price which was higher than the price which the plaintiff considered that he was bound to pay. On the 19th of March, the defendants threatened to dispose of the goods, unless the plaintiff purchased them at the price of 1*s*.-6$\frac{1}{2}$*d*. per gross. They threatened to sell the goods by 11 o'clock on the 20th of March unless the plaintiff was willing to pay this price. On the same day, the 19th March, a letter was written by the plaintiff's solicitor saying that the defendant could not sell the goods to a third person, as they were the property of the plaintiff. On the 20th March 1915 the plaint was filed in this suit at 12 o'clock, and, at 1-30 on that day, an application was made to me for an injunction and I granted an *ad-interim* injunction over the following Tuesday in these terms, *restraining the defendants* from selling, disposing of, or otherwise dealing with the goods referred to in paragraph 3 of the plaint, and I gave the plaintiff liberty to serve the defendants with the notice of motion for the following Tuesday, for an injunction restraining the defendants from selling, disposing of, or dealing with, the goods pending the hearing of this action and for a Receiver of the goods. I directed the notice of motion to be served before 4 o'clock at No. 3, Commercial Buildings where the defendant firm carry on business, or if these premises were closed, then on Mr. Cameron who was the manager of the defendant firm, at his private address. It appears, from the evidence of the plaintiff before me, that, after the injunction was granted, the plaintiff's son accompanied by one Askhay Kumar Rudra, an attorney of this Court and assistant of Babu Charu Chandra Bose, Attorney for the plaintiff, went to No. 3, Commercial Buildings and arrived there at about 2-15 P.M. They enquired at the office for Mr. Cameron and were told that Mr. Cameron was not there, and thereupon the plaintiff's son took the attorney to Mr. Marshall,

as he was the next superior officer in the office of the defendant firm. The plaintiff's son and his attorney stated that they read out a copy of my order to Mr. Marshall in the presence of Mr. Surita, an advocate of this Court; and that, after reading out the same, they handed Mr. Marshall a copy of the order, and they state that he read the same in their presence and in the presence of Mr. Surita, that they asked Mr. Marshall to sign an acknowledgment of the receipt of the copy of the said order, but Mr. Marshall refused to do this and said that his firm had already sold the goods. Akshay Kumar Rudra, the attorney, goes on to say that he attended, immediately after, at the office of the Jetty Superintendent of the Port Commissioners, with the plaintiff's son, and showed a copy of my order to the Deputy Superintendent and read out the same to him and asked him to sign an acknowledgment which he refused to do saying that he could only act on an order signed by an officer of this Court. Both the deponents state that, at the goods shed at the Jetty, they saw several cases of matches marked with the plaintiff's mark, which was pointed out, and the attorney states that he pointed out the goods to the plaintiff's son and also to one Satya Charan Ray who was the Jetty sircar of the plaintiff, asking the plaintiff's son to count the number of packages there, which he and the Jetty sircar accordingly did, telling the attorney that there were 75 cases of matches lying there. The affidavit of the attorney further states that, on the following day, he was informed by the plaintiff's son that 53 cases of matches had been sent to the Howrah station and the same were lying there at No. 13 Goods Shed, Howrah. There is an affidavit also filed on behalf of the plaintiff by Satya Charan Ray, confirming the counting of the cases of matches, and also stating that, after the attorney and the plaintiff's son had left, one Pran Kristo Coondoo, who was a sircar in the employ of the defendant company and whom he knew, came to Jetty No. 2 and gave directions to certain cartmen to take the goods to Murgihatta Godown-baree. He states that a portion of these goods were, thereafter, removed to Jetty Shed No. 2 by the employee of the defendant company.

On behalf of Mr. Marshall, 3 affidavits are filed, one by himself in which he states at paragraph 4 that, about 2-30, after office hours, and after the business of the defendant firm was closed for the day, and while he was preparing to leave the office being actually in the act of changing his clothes, a person whom he did not know, accompanied by one Grandhi Subramaniam, called, and saw him at No. 3, Commercial Buildings, stating that he was an assistant of Messrs. Bose and Company and wanted to see Mr. Cameron. Mr. Marshall states that he informed him that Mr. Cameron was away from office and he, Mr. Marshall, was the next officer in charge of the office. Mr. Marshall states that the attorney informed him tha

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he had obtained an injunction restraining Mr. Cameron from disposing of the 75 cases of the matches in question, and that he told him, as was the fact, *that they had already been sold and paid for*, and then the attorney asked him to whom they had been sold ; he thereupon said that, if they wrote and asked him, he would give them information in writing as he did not want to run the risk of being misrepresented if he gave any information verbally. Mr. Marshall then goes on to state that he left the office shortly after with Mr. Surita and one Mr. Moss, who were both present. Mr. Marshall further states that the attorney produced and handed to him a piece of paper with some typewritten matter on it which bore no signature to shew that it was a copy of an actual order. He states that he glanced at the document, but did not read it through before handing it back to him, and he denies that the document was read out to him, and he is supported in his denial by an affidavit of Mr. Surita. In paragraph 6 of his affidavit, Mr. Marshall states that he had nothing whatever to do with the removal of or the endeavour to remove any of the goods in question, and that he never at any time sold or disposed of or otherwise dealt with the goods or any of them in disobedience or contempt or breach of the alleged injunction or order, and he states, in paragraph 7, that for the first time he came to hear that the Jetty sircar, Pran Kristo Coondoo, had been concerned in the removal of the said goods, when he found the statements to that effect in that affidavit of Sattya Charan Roy. He states that this removal was not done in pursuance of any order or injunction given by him or by any one belonging to the defendant firm, and he states that he has since ascertained that the sircar did, on the 20th of March, remove or cause to be removed some of the goods, but that he did so after office hours in his spare time and at the request of and on behalf of the purchaser Jugal Kissore Pyne, and in nowise on behalf of the defendant firm.

As before stated, Mr. Surita filed an affidavit which corroborates Mr. Marshall's statements with regard to the interview on the afternoon of 20th March. A further affidavit is filed on his behalf by one Jugal Kishore Pyne who states that, on the 3rd of March, he agreed to purchase from the defendant firm 75 cases of matches at Re. 1-7-6 per gross. He states that the purchase was completed by him at the office of the defendants on 20th March and that he paid a sum of Rs. 5,507-13-0 as referred to, as the price of the matches, and that he was thereupon handed the gate-pass, in respect of the goods, to obtain delivery from the Port Commissioners' Jetty. He states that the purchase price was paid and the whole transaction was completed by some time between 12 noon and 12-30 on Saturday, and that he thereupon immediately arranged with one Pran Kristo Coondoo, the defendant firm's Jetty sircar, for an extra charge of Rs. 3 to remove the

goods from the Jetty to his godown at Sukea's Lane, and that he gave him the gate pass. He states that some time about 4 or 4-30 in the afternoon, he returned to his godown and there found that in the interval 53 cases out of 75 cases had been brought from the Jetty and stored there, and he never heard about any injunction until 22nd March.

Now, it is urged before me on behalf of Mr. Marshall that there has been no breach of the terms of the injunction, inasmuch as he has not sold, disposed of, or otherwise dealt with, the goods, and considerable discussion took place before me with regard to the absence from my order of the words "permitting the disposal of or dealing with the goods"; and that was urged on behalf of Mr. Marshall that, in the absence of these words, he had committed no breach of injunction and that he was not guilty of any contempt of Court In my opinion the absence of these words makes no difference : see *Harding* v. *Tingey* (1).

Now, it seems to me abundantly clear from the facts stated in the affidavits that, if Mr. Marshall had applied his mind to the injunction and communicated with the Jetty Superintendent or with the purchaser of the goods, or in any case. if he had communicated the name of the purchaser to the plaintiff, the removal of the goods in question could not have taken place, and that in that case these proceedings would not have been brought. Of course, when it comes to a matter affecting the liberty of the subject, he is entitled to have the terms of the injunction considered with the greatest strictness and have everything that could possibly be urged or said in his favour considered on his behalf and given effect to, and it would clearly be wrong to send Mr. Marshall to prison having regard to the facts and circumstances of this case, but I cannot think that he performed the duty, which is incumbent on every good citizen to perform, of assisting the process of the Court in whatever form it comes before him. That the goods were dealt with despite the injunction or after it had been granted was due to his action or rather inaction ; he has therefore committed contempt of Court and accordingly, although I make no order for committal, I direct Mr. Marshall to pay the costs of this motion."

Mr. Marshall, being dissatisfied with the above order, preferred this appeal.

Mr. M. Zorab (with him *Mr. Hyam*), for the appellant. This is the contempt motion of the 26th March 1915 Mr. Justice Greaves has found me guilty of contempt of Court and has ordered me to pay costs.

(1) (1864) 12 W. R. (Eng.), 684, 685.

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[JENKINS, C.J. We were told that he was ordered to pay costs without being found guilty of contempt.]

Since getting a copy of the order I find from the judgment that he has been found guilty of contempt.

[JENKINS, C.J. That gets over the difficulty of the appeal lying.]

Yes. The terms of the injunction restrain the defendants only, and nothing is said about their "servants or agents." Notice of the injunction was directed to be served on Mr. Cameron, the Manager of Messrs. Kendrew & Co., whereas Mr. Marshall is an employee under him. It is not a mandatory injunction, but a prohibitory one. The words "servants and agents" have been added in the notice of motion for committal for contempt for breach thereof.

I submit (i) that, the injunction being directed to the defendant firm, Mr. Marshall could not be proceeded against for breach of injunction (might be for contempt): see *Lord Wellesley* v. *The Earl of Mornington* (1). (ii) If I could not be found guilty of breach of injunction, I could not be shown to be guilty of any other species of contempt of Court, which is the genus, breach of injunction being a species. I must have an opportunity of tendering an apology on general principles and therefore I am entitled to know the particulars of the breach. (iii) Upon the merits—the affidavits in support of this motion do not show breach of injunction, or contempt of any kind. (iv) There are no materials, no discretion, much less jurisdiction of Court, to order me to pay costs, and further the Court proceeded on a misapprehension of facts. The two cases of *Lord Wellesley* v. *The Earl of Mornington* (1) show that the injunction really did not extend to servants and agents.

(1) (1848) 11 Beav. 180, 181.

I therefore submit that the case for breach of injunction must go, and there is no such finding either.

[JENKINS C. J. You submit that the procedure on injunction must be followed?]

Yes. See Kerr on injunction with regard to the procedure to be followed; also Woodroffe's injunction, 3rd Edition, p. 73. The motion is to be supported by affidavit specifying the particular acts constituting breach.

Passing on to the *merits*: in paragraph 7 of their affidavit they say they gave notice of injunction to me and that Pran Kristo Coondoo was instrumental in removing the goods from the Jetty. It being a Saturday and Mr. Justice Imam being indisposed, the injunction order was got from Mr. Justice Greaves at his house. Mr. Marshall, at 2-30 P.M. the same day, said the goods had been sold (though 53 only out of 75 cases had been removed). We had already sold them to Jugal Kishore Pyne, and the injunction itself had failed.

[JENKINS C.J. It does not appear that Marshall did anything?]

Nothing, except that a letter was written by him before 11 o'clock on the 20th March, the injunction being intimated to Mr. Marshall at 2-30 P.M. that day.

[MOOKERJEE J. Is Mr. Marshall said to have done anything beyond what is stated in paragraph 7?]

That is all.

That is just the reason why Mr. Justice Greaves set it aside. Further, the goods are alleged to have been removed by the sircar of Messrs. Kendrew & Co., on behalf of and under payment from the purchaser Jugal Kishore Pyne. The learned Judge refers to the case of *Harding* v. *Tingey* (1), cited in Kerr on

(1) (1864) 12 W. R. (Eng.) 684, 685.

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Injunctions for quite a different purpose. I submit that this order cannot stand.

[JENKINS C.J. We will hear the respondent now.]

Mr. N. N. Sircar (with him *Mr. C. C. Ghose*), for the respondent. I wish to support the order. Assuming Mr. Marshall knew nothing at all about the order of injunction, though the selling had been completed, he knew at 2-30 P.M. on Saturday that the order of the court prevented the defendant *dealing with* or *disposing of* the goods at the Jetty. Marshall was the next man in the office after Cameron, and their firm's sircar removes the goods. The papers show that Marshall's statement on the 26th that he knew nothing is absolutely false. He admits he glanced through it. Yet he would not give the name of the purchaser.

[JENKINS C.J. What has that got to do with the question before us—whether he did anything towards selling or disposing?]

That is one of the facts that will go to show that Marshall was determined not to carry out or give effect to the Court's order. If his story is accepted, there can be no breach of injunction or contempt. And must we serve every darwan or servant of the firm?

[JENKINS C.J. You have your remedy against the firm.]

The partners are not here. But Marshall, who was in charge of these goods with our mark on them, dealt with them and sold them *before*, and again dealt with them *after*, the injunction.

[JENKINS C.J. How do you show he assisted in the breach?]

In this way: the sircar does not make any affidavit and Marshall says he knew nothing about the removal till the 26th. The whole intention of that injunction was to keep the goods where they were. On their

own showing the goods were not removed till 4-30 P.M. He came to Court with two absolutely lying cases: Marshall's attorney says that the goods were sold and removed in the morning, while Marshall in paragraph 7 of his affidavit denies removal under his orders. Marshall has got to change his case because he found from the plaintiff's affidavit that they had found all the goods at the Jetty where they had proceeded direct from Marshall's office on Saturday.

[MOOKERJEE J. If the purchaser had got the gate-pass, then there was a delivery to him?]

That is what the purchaser, Jugal Kishore Pyne, says in his affidavit.

[JENKINS C.J. There is no suggestion that that is false. As to Marshall lying, there is nothing to show it. It seems to us you misapprehend the position.]

I cannot carry the case further.

JENKINS C.J. This is an appeal from an order of Mr. Justice Greaves which has been treated before us as an order finding that there had been a contempt by the appellant Marshall which merited, if not imprisonment, at any rate, the payment of the costs of the motion. The notice of motion called upon J. I. Marshall, an assistant of the defendant firm, to take notice that, on Monday the 29th March 1915, an application would be made on behalf of the plaintiff for an order that he, J. I. Marshall, do stand committed to the custody of the Superintendent of the Presidency Jail for having committed a breach of the injunction granted by Mr. Justice Greaves on the 20th March 1915, restraining the defendant firm, *their servants and agents* from disposing of, selling or dealing in any manner with, the goods referred to in the plaint. That notice of motion is erroneous, for, the injunction

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makes no mention of Mr. Marshall or of servants and agents. It necessarily follows from this that the procedure which had been adopted was misconceived. The proceedings against Mr. Marshall, if any, should have been for *assisting* in a contempt of Court. But the case need not be disposed of on that ground, because, on the merits, it has not been made out that Mr. Marshall in any way assisted in a contempt of Court. He did nothing. He did not dispose of, sell, or deal with, the goods. Nor did he in any way *assist* in disposing, selling of, or dealing with, them *after* service on him of the injunction. All that he did was done prior to the injunction. It has been suggested before us that he is in some way responsible for the delivery which is said to have taken place after the injunction. But on the facts it appears that the delivery was prior to the injunction. There was no contempt or participation in contempt on Mr. Marshall's part. In my opinion, the order of the learned Judge is erroneous and must be set aside and the motion dismissed with costs of the hearing before Mr. Justice Greaves and before us.

WOODROFFE J. I agree.

MOOKERJEE J. I agree.

G. S. *Appeal allowed.*

Attorneys for the appellant: *Orr, Dignam & Co.*
Attorney for the respondent: *Charu Chandra Bose.*

PRIVY COUNCIL.

TARA KUMARI

v.

CHATURBHUJ NARAYAN SINGH

(AND ANOTHER APPEAL CONSOLIDATED).

*P.C.**
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June 16, 17;
July 13.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Hindu Law—Inheritance—Succession to Impartible Estate governed by rule of primogeniture where no custom excluding females existed—Widow of holder who died without male issue—Evidence of separation in joint family—Junior member leaving family-house and living in separate residence after obtaining grant for maintenance.

The succession, on the death of a holder without male issue, to an impartible estate which descended by the rule of primogeniture, the junior members of the family being entitled to grants for maintenance, and where no custom excluding females existed, depended on whether there had been a separation between two brothers, the father and predecessor in title of the deceased holder and the father of the next contingent reversioner. On that question the Courts in India differed, the Subordinate Judge finding that a separation had taken place, and the High Court being of opinion that what had occurred did not, in intention and fact, amount to a complete separation.

Held (reversing the decision of the High Court), that the evidence clearly proved that there had been a complete separation, and that the widow of the last holder was therefore entitled to succeed to the estate for a Hindu widow's interest in priority to the next male reversioner.

Consolidated appeal 31 of 1913 from a judgment and two decrees (7th January 1910) of the High Court at Calcutta, which reversed a judgment and two decrees (22nd January 1909) of the Court of the Subordinate Judge of Monghyr.

The plaintiffs were the appellants to His Majesty in Council.

* *Present*: VISCOUNT HALDANE, LORD SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

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The main question for determination on this appeal was as to whether the appellants had established that a separation took place between the respective predecessors in interest of the appellants and the respondents, (the said predecessors having been two brothers members of a Hindu joint family governed by the Mitakshara law), so as to bar the title of the respondents to the property in suit.

That property was an ancestral family property, called Taluka Telwa, an impartible estate, the succession to which was governed by the rule of primogeniture. It descended to, and was owned by, Thakur Bhairo Narayan Singh who died in 1272 F.S. (1863) leaving two sons, Ranjit Narayan Singh and Bhupat Narayan Singh.

The succession to the estate was regulated by a custom of the family by which the eldest son of the last holder succeeded to the *gadi* as sole owner, the other sons being entitled to receive maintenance. In accordance with the custom Ranjit Narayan, on the death of his father, succeeded to the *gadi* as Thakur; and on 14th Assin 1287 F.S. (14th September 1879) Ranjit Narayan executed a mokurari pottah in favour of his younger brother Bhupat Narayan, by which he assigned to him 2 mouzahs and 4 bighas of kamat land in another mouzah as a grant for his maintenance. By the terms of the deed the land granted was not alienable by the grantee, but notwithstanding that prohibition Bhupat Narayan executed mortgages from time to time in order to raise money when he needed it.

In 1306 F.S. (1897) Ranjit Narayan died leaving a widow Gyan Kumari, and a minor son Ram Narayan. The widow was made guardian of her minor son who, according to the custom, succeeded to the *gadi* as Thakur.

Bhupat Narayan died in Magh 1311 F.S. (1902) leaving a son, the respondent Chaturbhuj Narayan, whose four sons were the other respondents.

Ram Narayan died while still a minor in 1312 F.S. (1903) leaving no issue but only a widow, the appellant Tara Kumari. She applied to the Revenue Courts to have her name registered as heiress of her deceased husband and as such proprietress of the gadi; Chaturbhuj Narayan who claimed to be the Thakur on the death of Ram Narayan without male issue made objection. He alleged that he and Bhupat Narayan had never ceased to be joint members of the family with Ranjit Narayan and Ram Narayan, and that he alone succeeded to the *gadi* on the death of the latter, according to the custom, and that he had since been in possession: and he also applied for registration of his name as Thakur, his application being granted and Tara Kumari's rejected, a decision which was subsequently confirmed on appeal by the Revenue Courts and authorities.

During his life time Thakur Ranjit Narayan Singh had incurred debts, and had executed certain mortgages, and after his death his creditors demanded payment. Tara Kumari thereupon sold a half share of Taluk Telwa to the appellant, Maharajah Sir Raveneshwar Pershad Singh Bahadur, for Rs. 50,000 on 16th September 1906 which was to be applied to pay off the amount due on the mortgages, amounting to Rs. 47,699, and the balance was to defray the expenses of Tara Kumari in the present litigation. The appellant, the Maharajah, paid off the mortgages.

On 19th August 1907 the appellants instituted the present suits against the respondents. She joined the Maharajah as a formal defendant in her suit; and he joined her as a defendant in his suit in the same way, and also made the mortgagees party defendants.

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The claim in each suit was substantially for a declaration that Tara Kumari had succeeded to the estate as heiress on the death of her husband, and that the defendant Chaturbhuj Narayan Singh had no title thereto, on the ground that the mokurari grant of 1287 F.S. had constituted a separation between Ranjit Narayan and his brother Bhupat, and that from that time they had ceased to be members of a joint family and the *gadi* had formed the separate estate of Ranjit Narayan. The plaintiffs claimed to recover possession of their respective half shares.

The Maharajah in his plaint also prayed in the alternative for relief on the basis of the mortgages which he had paid off, and of which he was the assignee, in the event of its being held that the defendant, Chaturbhuj Narayan, was entitled to the property in succession to Ram Narayan.

The defendant Chaturbhuj Narayan denied that there had been any separation between Ranjit Narayan and Bhupat Narayan as alleged: he contended that they had remained joint in food and estate, that the mokurari pottah was merely a provision for maintenance, and he claimed that he became, on the death of Ram Narayan, the owner of the estate. He also contended that the plaintiff Maharajah could not in the same suit claim relief in the alternative as he had done.

The only issues material for the purposes of this appeal were—

(i) Is the suit bad for misjoinder of parties and causes of action?

(ii) Did Bhupat Narayan Singh and his son Chaturbhuj Narayan separate from Thakur Ranjit Narayan Singh and Ram Narayan Singh in food and estate, and did the two branches of the family headed by Thakur Ranjit Narayan Singh and Bhupat Narayan Singh

live joint in food and estate till the death of Thakur Ram Narayan Singh?

(iii) If the two branches of the family separated, as alleged by the plaintiffs, did Taluk Telwa continue to be joint undivided property of the family even after the separation, by reason of its being impartible ancestral property, and did it pass to the defendant Chaturbhuj Narayan Singh by survivorship on the death of Thakur Ram Narayan Singh in preference to his widow?

The Subordinate Judge held on the facts proved before him that Bhupat Narayan Singh separated from his elder brother after the execution of the mokurari pottah in his favour, and that the first defendant (Chaturbhuj Narayan Singh) as a separated member of the family was not entitled to succeed to the estate in preference to the plaintiff Tara Kumari as the widow of the last holder. He also held that the Maharajah's suit was not bad for misjoinder of parties or causes of action; that the sale to him was valid; that the mortgages were for family ancestral debts; that they were duly paid off by the Maharajah; and that he was entitled to recover such payments from the estate. He was, however, of opinion that the alternative relief claimed by him could not be granted inasmuch as he had not asked for consequential relief.

Both suits were accordingly decreed, and so far as the titles of the plaintiffs were respectively concerned they were declared entitled to equal half shares of the estate with possession and costs from the first defendant.

Appeals were preferred by the defendants from each of those decrees to the High Court, and were heard by a Division Bench of that Court consisting of BRETT and SHARFUDDIN JJ. who reversed the decrees of the Subordinate Judge, and dismissed both suits with costs.

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The High Court, while accepting all the facts as found by the Subordinate Judge, was of opinion that such facts were not sufficient to prove that there was a "complete separation" between Bhupat Narayan Singh and Ranjit Narayan Singh, and it accordingly held that at the time of the death of Thakur Ram Narayan Singh the first defendant and his sons were not separate from him, and therefore that "the estate must follow the ordinary line of inheritance to joint property under the Mitakshara law, subject to the rule of primogeniture."

As to the alternative relief claimed by the Maharajah as transferee of the mortgages, the High Court was of opinion "that it could not be claimed in the suit as framed, being inconsistent with the main relief sought in the suit;" but it agreed with the Subordinate Judge in holding that the debts for which the mortgages had been given were family ancestral debts legally recoverable from the estate, and which had been discharged by the Maharajah.

On these appeals,

Sir R. Finlay, K. C., and *G. R Lowndes*, for the appellants, contended that at the time of the death of Ram Narayan Singh, Chaturbhuj Narayan, the first respondent, and his sons were separated from him in food, worship and estate, and had no right, in preference to Tara Kumari, to succeed to any part of the estate in suit. The property being said by the respondents to be impartible, the appellants had to show that a separation as above took place, and it was submitted that on the evidence in the case it had been established that there had been a complete separation, and that the Subordinate Judge had rightly so held. The respondents rely on, among others, the case of *Laliteshwar Singh* v.

Rameshwar Singh (1) to support their contention that this estate being impartible there can be no separation in estate between Ranjit Narayan and his brother Bhupat Narayan; but if that was the holding in that case, it is submitted it was wrongly decided. In the present case the grant of the mokurari pottah, it was contended, showed an indication of an intention to separate, and it is certain that Bhupat Narayan, after the lease was granted, went away, built himself a house, and lived in it apart from his brother. He, and not Ranjit Narayan though then head of the family, had paid the expenses of a daughter's marriage and had borrowed money to do so after the granting of the mokurari lease, and Bhupat Narayan had in 1905 stated in proceedings in Court that he was separate from the Thakur. Even if the estate is impartible, it was submitted that the question of separation was one of intention and of fact to be determined on the evidence: *Bejai Bahadur Singh* v. *Bhupindra Bahadur Singh* (2). Stokes's Hindu Law, Books 466, 467; and Mitakshara, Chapter II, Section 12, verse 1, were also referred to.

As to the alternative relief and misjoinder of parties in the case of the Maharajah appellant, reference was made to the Civil Procedure Code, 1908, Sections 45 and 28. There was no objection in law to alternative inconsistent claims, and it was not necessary for the plaintiff to seek consequential relief by suing for payment of the mortgage debts.

DeGruyther, *K. C.*, and *A. M. Dunne*, for the respondents, contended that the appellants had wholly failed on the evidence to establish any separation according to Hindu Law between Ranjit Narayan Singh and Bhupat Narayan Singh; that the rights of Bhupat and

(1) (1909) I. L. R. 36 Calc. 481. (2) (1895) I. L. R. 17 All. 456; L. R. 22 I. A. 139.

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his sons and descendants as junior members of the joint family continued up to the death of Ram Narayan Singh; and that the respondent Chaturbhuj Narayan Singh then became entitled to the property in suit as Thakur and owner of it. Impartible property on devolution, it was submitted, becomes joint property for the purpose of devolution, and therefore the widow being only entitled to maintenance is excluded: see Mayne's Hindu Law (7th edition), pages 731, 732; also page 671, paragraph 495. [*Sir R. Finlay, K. C.*, said the property, being impartible, was never joint.] The case of *Laliteshwar Singh* v. *Rameshwar Singh* (1) decided that there can be no separation in estate in the case of an impartible raj; see also *Raja Rup Singh* v. *Rani Baisni* (2). In that case what the contention now is was laid down thus:— After referring to the case of *Chintamun Singh* v. *Nowlukho Konwari* (3), their Lordships say, "In the last mentioned case, following the decision in *Yanumula Venkayamah* v. *Yanumula Boochia Vankondora* (4), it was held that an ancestral estate even though impartible is not the separate or self-acquired estate of the single member upon whom it devolves, so long as the family continues joint": see *Venkata Rao* v. *Court of Wards*(5) [*Sir Jhon Edge* referred to *Chintamun Singh* v. *Nowlukho Konwari* (3)]. In that case there was in fact a partition of part of the property in 1832 as is shown in the original record of the case, the rest of the property remaining undivided. Here there was no separation. The mokurari grant was one merely for maintenance, and did not indicate any intention to separate [VISCOUNT HALDANE. You

(1) (1909) I. L. R. 36 Calc. 481.
(2) (1884) I. L. R. 7 All. 1, 11; L. R. 11 I. A. 149, 154.
(3) (1875) I. L. R. 1 Calc. 153; L. R. 2 I. A. 263.
(4) (1870) 13 Moo. I. A. 333, 339.
(5) (1879) I. L. R. 2 Mad. 128; L. R. 7 I. A. 38.

must look at the whole case together, and not isolate that transaction from all the evidence as to separation in other parts of the case.] The Subordinate Judge himself thought it would not of itself create a separation. The opinion of the High Court on it was, "The fact that after the grant of the mokurari lease for maintenance Bhupat Narayan lived in a separate house alongside his family homestead, that he and his branch of the family were afterwards separate in food, and possibly in worship, and that he paid the expenses of his family out of the profits of the property granted to him for maintenance by borrowing money mortgages on that property, do not appear to us in this case to be sufficient to prove that there was a complete separation between Bhupat Narayan and Ranjit Narayan by which Bhupat sacrificed his expectancy to succeed to the family property on the failure of nearer male heirs of Ranjit Narayan." Reference was made to *Sartaj Kuari* v. *Deoraj Kuari* (1). The Maharajah appellant was not entitled in this suit to the relief claimed by him in the alternative.

Sir R. Finlay, K.C., in reply, referred to *Durga Prasad Singh* v. *Durga Koeri* (2) where it was held that it did not necessarily follow from the fact of an estate being impartible, that no division or separation can be effected with respect to it. For determining the heirs the same rules as to partible estates: *Jogendra Bhupati Hurro Chundra Mahapatra* v. *Nityanand Man Singh* (3), *Kali Krishna Sarkar* v. *Raghunath Deb* (4), *Katama Natchiar* v. *Raja of Shivagunga* (5). There was no inconsistency between impartibility and the succession of a female:

(1) (1888) I. L.R. 10 All. 272, 285; L. R. 15 I. A. 51, 63, 64.
(2) (1873) 20 W. R. 155, 156, 157.
(3) (1890) I. L. R. 18 Calc. 151.
(4) (1903) I. L. R. 31 Calc. 224.
(5) (1863) 9 Moo. I. A. 539 5

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Ram Nundun Singh v. *Janki Koer* (1). *Raja Rup Singh* v. *Rani Baisni* (2) was distinguishable as the family was joint in that case, and a widow could only get maintenance. This case must be determined on the evidence: *Bejai Bahadur Singh* v. *Bhuvendra Bahadur Singh* (3); and here there was sufficient evidence, it was submitted, of separation.

The judgment of their Lordships was delivered by

SIR JOHN EDGE. These are consolidated appeals. That in which Thakurani Tara Kumari is the appellant has arisen in a suit which was brought by her on the 19th August 1907 in the Court of the Subordinate Judge of Monghyr against Chaturbhuj Narayan Singh and his minor sons. In that suit Maharajah Sir Ravaneshwar Pershad Singh was a *pro formâ* defendant. The other appeal in which Maharajah Sir Ravaneshwar Pershad Singh is the appellant, has arisen in a suit which was brought by him on the 19th August 1907 in the Court of the Subordinate Judge of Monghyr against Chaturbhuj Narayan Singh and his minor sons. In the latter suit Thakurani Tara Kumari and others were *pro formâ* defendants. In each suit the Subordinate Judge made a decree in favour of the plaintiff in the suit. From each decree Chaturbhuj Narayan Singh and his minor sons appealed to the High Court of Judicature at Fort William in Bengal, which, by its decree in each appeal, reversed the decree to which the appeal related and dismissed the suit. From those decrees of the High Court these consolidated appeals have been brought.

The Thakurani is the widow of Thakur Ram

(1) (1902) I. L. R. 29 Calc. 828; L. R. 29 I. A. 178.
(2) (1884) I. L. R. 7 All. 1; L. R. 11. I. A. 149.
(3) (1895) I. L. R. 17 All. 456; L. R. 22 I. A. 139, 156.

Narayan Singh, who was a son of Thakur Ranjit Narayan Singh, who was the elder of the two sons of Thakur Bhairo Narayan Singh. Chaturbhuj Narayan Singh was the son of Bhupat Narayan Singh, who was the younger son of Thakur Bhairo Narayan Singh. Thakur Ram Narayan Singh died without issue male The immovable property to which the suits relate is known as Taluka Telwa, otherwise the Telwa Gadi, in the district of Monghyr. Taluka Telwa is an ancestral impartible estate which, in his lifetime, was held as his estate by Thakur Ram Narayan Singh, and had previously been held by his father Thakur Ranjit Narayan Singh, and before him by his father Thakur Bhairo Narayan Singh. By the kulachar or family custom Taluka Telwa descends by the rule of primogeniture. The appellants allege that Thakur Ranjit Narayan Singh, on the 14th September 1879, granted to his brother Bhupat Narayan Singh a mokurari pottah (perpetual lease) of a part of Taluka Telwa for the maintenance of Bhupat Narayan Singh and his descendants, and that Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh separated and ceased to constitute a joint Hindu family; except in so far as the family custom applies, the law of the Mitakshara governed Thakur Bhairo Narayan Singh and his descendants. The Thakurani claims that she, as the widow of Thakur Ram Narayan Singh, who left no issue, succeeded to the estate on his death for a Hindu widow's interest. It is proved that after her husband's death she, in order to discharge debts which had been contracted by Thakur Ranjit Narayan Singh, sold a moiety of Taluka Telwa to the Maharajah. In her suit the Thakurani claimed possession of one moiety of Taluka Telwa, as the widow of Thakur Ram Narayan Singh. The Maharajah in his suit claimed possession of the other moiety of

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Taluka Telwa as the vendee from the Thakurani. Chaturbhuj Narayan Singh is in possession, and he and his minor sons deny that Thakur Ranjit Narayan Singh and Bhupat Narayan Singh separated.

The written statement of Chaturbhuj Narayan Singh in the suit of the Thakurani is not before this Board, but his written statement in the suit of the Maharajah is, having regard to the evidence and to the findings of the Courts below, instructive. In his written statement in the Maharajah's suit Chaturbhuj Narayan Singh alleged :—

"4. That the said family is governed by the Benares School of Hindu Law save and except that according to family custom the said ancestral zamindari descends according to the rule of primogeniture on the eldest male member of the eldest line and the junior members are entitled to maintenance and that females are in no way entitled to succeed to the said zamindari. The junior members even after khorposh or maintenance grants are made to them out of the joint property, are entitled to obtain the expenses of marriage, sradh and other similar ceremonies and all other necessary expenses from the income of the said property in the hands of the holder of the said estate for the time being.

"5. That with reference to paragraph 3 this defendant states that Thakur Ranjit Narayan Singh succeeded to the said estate on the death of his father in accordance with the family custom aforesaid and that the mokurari settlement referred to in the said paragraph was also made in accordance with the said custom and not otherwise. This defendant craves leave to refer to the original of the said mokurari deed for the terms thereof. This defendant wholly denies that either before or after the said mokurari settlement Bhupat Narayan Singh became separate from the said Ranjit Narayan Singh or that he was at any time separate in food, worship or estate from the said Ranjit Narayan Singh or that he lived in a house separately built. This defendant asserts that he and his father the said Bhupat Narayan Singh during his life time were joint in food, worship and estate with the said Ranjit Narayan Singh and after his death with Thakur Ram Narayan Singh and that they never ceased to reside in the family dwelling house. This defendant continued joint in food, worship and estate with the said Thakur Ram Narayan Singh until the latter's death and thereafter with the defendant No. 6, until shortly before the commencement of the registration proceedings when disputes and disagreements arose. The allegations to the contrary in paragraph 3 of the plaint are wholly false.

"6. That assuming, though by no means admitting, that Bhupat Narayan Singh and this defendant became separate from Thakur Ranjit Singh in the year 1287 F.S. and since then he and this defendant were separate in mess and business and lived in a separate house, as has been falsely alleged in the plaint, this defendant submits that nevertheless the impartible estate Taluka Telwa continued to remain joint family property as before, as it never was nor could be the subject of partition and the defendant No. 1 therefore became solely entitled to it under the family custom on the death of Thakur Ram Narayan Singh, in preference to his widow."

The "defendant No. 1" mentioned in the written statement is Chaturbhuj Narayan Singh, and the "defendant No. 6" is the Thakurani, who, as has been already stated, was a *pro formâ* defendant in the suit of the Maharajah. So far as is now material, the defence of Chaturbhuj Narayan Singh, as disclosed by his written statement, was that females were by the family custom excluded from a succession to the impartible estate and that the joint family had not separated.

No custom excluding the widow of a sonless and separated holder of the impartible estate of Taluka Telwa from the succession to the estate for a Hindu widow's interest has been proved, and it is well decided law that the widow of the last holder of an impartible estate which descends by the rule of primogeniture is not excluded from the succession if her husband was in fact separated and died without issue male, and if no custom which would exclude her from the succession is proved. It was held by this Board in *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (1) that where a custom is proved to exist it supersedes the general law, which, however, still regulates all outside the custom. In *Ram Nundun Singh* v. *Janki Koer* (2), this Board held that :—

"There is no inconsistency between a custom of impartibility and

(1) (1869) 12 Moo. I. A. 523.

(2) (1902) I. L. R. 29 Calc. 828 : L. R. 29 I. A. 178.

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the right of females to inherit, as may be illustrated by the well-known *Shivagunga Case* (1), and therefore the general law must prevail unless it be proved that the custom extends to the exclusion of females."

Consequently the only issue in these suits which is now material is one of fact, namely, the issue as to whether Thakur Ranjit Narayan Singh and Bhupat Narayan Singh separated.

The Subordinate Judge came to the conclusion that Thakur Ranjit Narayan Singh, being displeased with his brother Bhupat Narayan Singh because the latter kept women, separated from him. It was found as a fact by the Subordinate Judge that Bhupat Narayan Singh built a pucca house about a *tussi* (120 feet) to the westward of the family house, established a *Tulsi Pinda* there, and removed his family to his pucca house and lived there separately from Thakur Ranjit Narayan Singh. As a fact Thakur Bhupat Narayan Singh built a wall between his pucca house and the family house of Thakur Ranjit Narayan Singh and established a separate Thakurbari in his house. The houses were quite separate houses, as was found by the Subordinate Judge on the evidence.

A daughter of Chaturbhuj Narayan Singh was married after Thakur Ranjit Narayan Singh had in 1879 granted the mokurari pottah to Bhupat Narayan Sing. Chaturbhuj Narayan Singh attempted to prove that Thakur Ranjit Narayan Singh defrayed the expenses of that marriage. The Subordinate Judge, however, found on incontestable evidence that the expenses of the marriage were defrayed by Bhupat Narayan Singh and not by Thakur Ranjit Narayan Singh. As a matter of fact, Bhupat Narayan Singh borrowed Rs. 689-2-6 for the expenses of that marriage, and on the 27th June 1897 gave to Shir Lal Modi and Amir Modi a mortgage of lands which he held under

(1) (1863) 9 Moo. I. A. 539.

the mokurari pottah to secure the repayment to them of, amongst other moneys, that sum of Rs. 689-2-6, which was stated in the mortgage deed to have been borrowed by him from them "for performing the marriage of my own granddaughter, *i.e.*, the daughter of my son, Baba Chaturbhuj Narayan Singh."

On the 27th April 1905 Chaturbhuj Narayan Singh, on his examination in a criminal case which apparently related to the removal of some timber, stated, "I am separate from the Thakur of Telwa."

On a careful review of all the evidence the Subordinate Judge came to the conclusion that Bhupat Narayan Singh and his son Chaturbhuj Narayan Singh were separate from Thakur Ranjit Narayan Singh and his son Thakur Ram Narayan Singh.

The learned Judges of the High Court, whilst accepting as correct the findings of facts of the Subordinate Judge on which he had come to the conclusion that there had been a complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh, came to the conclusion that it was not proved that there was a separation in intention and in fact. As it is difficult to understand the reasoning of the learned Judges of the High Court, it is better to give the following extracts from their joint judgment. They say :—

"It is the case common to both sides that Bhupat Narayan was a man of licentious habits and that he made himself a nuisance to his brother Ranjit Narayan and created a scandal by introducing his mistresses into the family dwelling house. It was in consequence of this that Ranjit Narayan executed the maintenance grant in his favour in 1287 to enable him to start a separate establishment. There can be no doubt that, after receipt of the grant, Bhupat Narayan built himself a new house outside the old family dwelling and that in course of time a Thakurbari and a Tulsi Pinda were established in that house and that a wall of separation between his house and the family house was constructed. It seems to be also beyond doubt that after receipt of the grant Bhupat Narayan raised money by mortgages on the property leased to him and spent it on the

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marriage of members of his family and on their maintenance. Still are not all these acts such as might have been expected on the part of a member of the family who had received a grant for his maintenance ? Or must they be accepted as incontestable proof of an intention to separate from Ranjit Narayan from the time of the grant and of a separation in fact from that time ?

"It has not been contended before us, nor indeed could the contention be accepted as a sound one, that a separation in estate and from the joint family must follow as a necessary consequence from the receipt of a maintenance grant.

"The learned Subordinate Judge has accepted these facts coupled with the admitted separation in food as sufficient proof that from the date of the maintenance grant, Ranjit Narayan and Bhupat separated and ceased to be members of a joint Hindu family. We have given our careful consideration to the judgment of the Subordinate Judge and also to the evidence and the arguments of the learned pleader and counsel which have been advanced before us and even though we accept the findings of the Subordinate Judge we are unable to agree in his conclusion that the plaintiffs have proved that there was a separation in intention or in fact.

"The fact that after the grant of the mokurari lease for maintenance Bhupat Narayan lived in a separate house alongside his family homestead, that he and his branch of the family were afterwards separate in food and possibly in worship, and that he paid the expenses of his family out of the profits of the property granted to him for maintenance, by borrowing money on mortgages on that property, do not appear to us in this case to be sufficient to prove that there was a complete separation between Bhupat Narayan and Ranjit Narayan, by which Bhupat sacrificed his expectancy to succeed to the family property on the failure of nearer male heirs of Ranjit Narayan."

In the opinion of their Lordships, the evidence clearly proved that there had been complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh in worship, in food and in estate, and they find that there had been complete separation.

Their Lordships infer from the extracts which they have quoted from the judgment of the learned Judges of the High Court that those Judges considered that there could have been no complete separation of the joint family, as the impartible estate of Taluka Telwa

had not been partitioned between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh. Those learned Judges overlooked the fact that Bhupat Narayan Singh and his son had no coparcenary rights in the impartible estate, and no rights in that estate which entitled them or either of them to a partition of the impartible estate. They could not have prevented Thakur Ranjit Narayan Singh from alienating that impartible estate in such a way as to determine any contingent interest they had in it under the custom. Their contingent interest under the custom was liable to be defeated by an alienation of the estate by Thakur Ranjit Narayan Singh even if the family had remained joint, and as the family ceased to be a joint Hindu family the ordinary Hindu law of the Mitakshara gave to the Thakurani her widow's interest in the impartible estate in priority to the contingent interest of Chaturbhuj Narayan Singh under the custom. The Thakurani sold a moiety of the impartible estate to the Maharajah, and as there was valid necessity for that sale she conveyed a good title to the Maharajah.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be allowed, that the decrees of the High Court should be set aside with costs, and the decrees of the Subordinate Judge should be restored.

The respondents, Chaturbhuj Narayan Singh and his four minor sons, must pay the costs of the appeals.

Appeals allowed.

Solicitors for the appellants: *Downer & Johnson.*

Solicitors for the respondents: *T. L. Wilson & Co.*

J. V. W.

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suit to wind up a partnership and to have accounts taken, the membership of the firm was in dispute, certain persons being by the plaintiff alleged to be partners, and by the defendants to have been only employees remunerated by a share of the profits. An adjudication was made by the Trial Judge which declared that the partnership was dissolved as from 1st July 1907, and then "ordered and decreed" that "it is referred to the Assistant Referee of this Court to take the following account and make the following enquiries, that is to say, (*a*) to enquire who were the partners entitled to share in the assets and goodwill of the partnership business; (*b*) to take an account of the dealings of the parties with the assets of the partnership business." From that adjudication, though it was appealable, the appellants did not appeal. The Referee made the enquiries directed and and took the account. His report as to enquiry (*a*) was adverse to the appellants, was excepted to by them, and was confirmed by the Trial Judge in his final decree. On an appeal by the appellants raising the question whether inquiry (*a*) was rightly included in the first adjudication, or whether it was not one which should have been made by the Court itself:—*Held* (affirming the decision of the Courts below), that the first adjudication of the Trial Judge which included inquiry (*a*) was a preliminary decree under section 97 of the Civil Procedure Code, 1908, and that the appellants not having preferred an appeal from it could not question it on appeal from the final decree. Where on the dissolution of a partnership, one of the partners retains assets of the firm in his hands without any settlement of account, and applies them in continuing the business for his own benefit, he may be ordered to account for such assets with interest thereon, apart from fraud or misconduct in the nature of fraud. AHMED MUSAJI SALEJI *v.* HASHIM EBRAHIM SALEJI (1915) I. L. R. 42 Calc. 914

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——— **in Criminal Cases:** *See* PRIVY COUNCIL, PRACTICE OF ... 739

Appellate Court, jurisdiction of: *See* ADDITIONAL EVIDENCE .. 675

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Application for leave to appeal: *See* LEAVE TO APPEAL TO PRIVY COUNCIL 35

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Approver: *See* PARDON 856

Arbitration—*Bengal Chamber of Commerce, arbitration by—Arbitration Act (IX of 1899), s 14—Arbitration clause in a contract—Reference to an Association—Rules of an Association for the conduct of arbitration proceedings referred to it, whether imported into the contract and binding on the parties thereto.* Where a contract contains an arbitration clause by which it is agreed that any dispute arising out of the contract shall be referred to the arbitration of the Bengal Chamber of Commerce, the rules of the Association are imported into the contract and are binding on the parties. *Per* JENKINS, C. J. The decision in *Ganges Manufacturing Company, Ld. v. Indra Chand*, I. L. R. 33 Calc. 1169, was binding on the learned Judge (of the Court below) and should have been followed by him. CHAITRAM RAMBILAS *v.* BRIDHICHAND KESRICHAND (1915) I. L. R. 42 Calc ... 1140

——— **Act (IX of 1899) s. 14**: *See* ARBITRATION 1140

Arms, Joint possession of: *See* MISJOINDER OF CHARGES 1153

Arms Act (XI of 1878) ss. 4, 5, 14, 19 (*a*), (*f*), 20: *See* MISJOINDER OF CHARGES 1153

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Arrest of Ship—*Trespass—Absence of Notice—Cause of action—Admiralty jurisdiction—Letters Patent, 1865, cl. 32—Letters Patent, 1862, cl. 31—Charter of the Supreme Court, 1774, cl. 26—Admiralty Court Act, 1840, (3 & 4 Vict. c. 65)—Admiralty Court Act, 1861, (24 Vict. c. 10), s. 5—Colonial Courts of Admiralty Act, 1890, (53 & 54 Vict. c. 27) s. (2) (3) (a), s. 35—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (2)—Maritime necessaries—Action in rem—Wrongful seizure—Limitation Act (IX of 1908), Sch. I, Arts. 29, 36, 49—Pleadings.* On the 4th June 1910, the respondent company instituted a suit *in rem* against the *Clan Mackintosh* in this Court as a Colonial Court of Admiralty for an amount alleged to be due to them for maritime necessaries, and obtained a warrant of arrest. The ship was arrested on the same day, and remained under arrest until her release on the 31st January 1912, the action having been dismissed two days earlier on the ground of absence of jurisdiction. The owners of the ship were the appellant Company, who had their office in Burma On the 14th June 1912, the appellant company instituted the present suit in the ordinary original civil jurisdiction of this Court against the respondent company for the wrongful arrest of the ship. The suit as framed was based on malice or its equivalent but at the hearing the appellant company proceeded on the footing of the suit being one for mere trespas. *Held*, that in the absence of proof of malice or its equivalent, a suit for simple trespass will not lie for the arrest of a ship. *The Walter D. Wallet*, [1893] p. 202, *Xenos* v. *Aldersley*; *The Evangelismos*, 12 Moo.. P. C. 352, and *The Strathnaver*, L. R. 1. A. C. 58, referred to. The arrestment of the ship was a judicial act of the Court, and an ordinary step in an

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action *in rem*. Under the arrest, the custody and possession was with the Marshal as an officer of the Court and could not be regarded as a detention by the respondent company The damage, if any, suffered from the continuance of the officer's custody, and possession was due not to the default of the respondent company but to the law's delay. *Peruvian Guano Co.* v *Dreyfus*. [1892] A. C. 166, followed. The foundation of the Admiralty jurisdiction of the High Court, more especially in respect of maritime necessaries discussed. *The "Two Ellens,"* L. R. 4 P. C. 161, *The Henrich Bjorn*, L. R 11 A. C. 270, *Murray* v. *Longford*, 1 Fulton 95. *The Asia*, 5 Bom H. C. (O. C.) 64, *The Portugal*, 6 B. L. R. 323, *Bardot* v. *The Augusta*, 10 Bom. H. C. 110, referred to. Assuming that the High Court in its Admiralty jurisdiction did not acquire jurisdiction over maritime necessaries by any previous enactment, such jurisdiction would now rest on the Colonial Courts of Admiralty Act, 1890, which vests in it the powers described in section 5 of the Admiralty Act, 1861. : To oust the jurisdiction of this Court under section 5, it is not enough that the owners of the ship should be in fact domiciled in India or Burma ; this domicile has to be proved to the satisfaction of the Court. *Ex parte Michael*, L. R. 7 Q. B. 658, followed. Inasmuch as such proof was not produced before the Court, when the order for arrest was made, the order for arrest cannot be treated as *coram non judice* or a nullity. Assuming that an action would lie in the absence of proof of malice or its equivalent, the action would be for wrongful seizure under legal process and would be barred by Art. 29 of the Limitation Act. It is imperative under Order VII, rule 1 (*e*) of the Code of Civil Procedure that a

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plaint should contain "the facts constituting the cause of act'on and *when it arose.*" MADRAS STEAM NAVIGATION, CO., LD. *v.* SHALIMAR WORKS, LD., (1914) I. L. R 42 Calc. 85 86

Assessment: *See* CHAUKIDARI CHAKRAN LANDS 710

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Bail—*Grounds of admission to bail—Confession of a co-prisoner materially corroborated as to applicant—Relative powers of the Hgih Court and Subordinate Courts to grant bail—Criminat Procedure Code (Act V of 1898) ss. 497 and 498.* Section 497 of the Criminal Procedure Code contains a rule founded on justice and equity, and should be followed by the High Court, unless any thing appears to the contrary. The extended powers given to the latter by s. 498 are not to be used to get rid of the reasonable and proper provision of the law laid down in s. 497. The High Court refused bail where a confession by a co-accused implicating himself and the petitioners was materially corroborated as to the latter by other evidence taken at the preliminary enquiry into offences under ss. 307 and 337 of the Penal Code.—ASHRAF ALI v. EMPEROR (1914) I. L. R. 42 CALC. 25

Bailiff—*Writ or warrant authorising him to give possession of immoveable property—Use by bailiff of reasonable degree of force to effect removal of person refusing to vacate—Practice of bailiffs taking strangers as assistants—Time of delivery of writ of possession for*

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execution—Piecemeal trial of lengthy cases by Magistrates—Penal Code (Act XLV of 1860), s. 323—Presidency Small Cause Courts Act XV of 1882, ss 43, 48—Civil Procedure Code (Act V of 1908), O. XXI, rr. 85, 97; and First Schedule, App. E. Form No. 11—Practice. A bailiff of the Presidency Small Cause Court in the execution of a writ, issued under s. 43 of the Presidency Small Cause Courts Act, requiring or authorizing him "to give possession" of certain premises to the applicant, may use a reasonable degree of force in order to effect the removal of persons bound by the decree and refusing to vacate the same, not withstanding the omission in the writ of words expressly authorizing their removal. *Quare*: Whether the English Common Law or the Civil Procedure Code applies to the writ or warrant in question. In a writ of possession under the former, words expressly authorizing forcible removal are not inserted, but an order "to give possession" authorizes such removal, if need be; and, if the Code applies, the omission of such words is immaterial. O. XXI, r. 97 of the Civil Procedure Code merely provides an additional or alternative remedy. Where the bailiff proceeded to the premises, and on the occupant's wife refusing to vacate, pulled or dragged her out of the house, and the force used for the purpose caused her, when released, to fall on the ground whereby she received slight injuries:—*Held*, that he was legally justified in the employment of such amount of force, and could not be convicted therefor under s. 323 of the Penal Code. In such cases it is impossible to calculate or apply with the utmost nicety the degree of force necessary and yet not more than sufficient. Observations as to the practice of bailiffs taking with

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them, as assistants, persons unconnected with the Court, and as to the time of delivery to them of writs for execution. Piecemeal conduct of trials by Magistrates condemned. MEREDITH *v.* SANJIBANI DASI. (1914), I. L. R. 42 CALC. ... 313

Bandhus: *See* HINDU LAW—INHERITANCE 384

Bankruptcy Act 1883 (46 & 47 Vic. c. 52): ss. 33, 102: *See* MINOR ... 225

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s. 40 : *See* INSOLVENCY ... 289

Bengal Chamber of Commerce: *See* ARBITRATION 1140

Bengal Tenancy Act (VIII of 1885), ss. 26, 178, sub-s. (3), cl. (d): *See* OCCUPANCY HOLDING, ... 254

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s. 87: *See* OCCUPANCY HOLDING ... 172

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s. 171 : *See* RATES AND TAXES ... 625

Bhinnagotra Sapindas : HINDU LAW—INHERITANCE 384

Bond—*Slavery bond—Public policy—Overwhelming interest.* Where in a bond the executant bound himself down to daily attendance and manual labour until a certain sum was repaid in a certain month, and it penalised default with overwhelming interest:—*Held*, that such a bond was not enforceable at law being opposed to public policy. —RAM SARUP BHAGAT *v.* BANSI MANDAR. (1915) I. L. R. 42 CALC. 742

Bonus, stipulation for: *See* PATNI LEASE 1029

Bought and Sold Notes: *See* SALE OF GOODS 1050

Broker, personal liability of: *See* SALE OF GOODS 1050

Calcutta Municipal Act (Beng. III of 1899), ss. 223, 228: *See* RATES AND TAXES 625

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Certified Copy, filing of: *See* APPEAL 433

Charge: *See* CO OPERATIVE SOCIETY ... 377

———————DEBT 849

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Charge—*Explosive Substances Act, 1883 (46 & 47 Vict. c. 3), s. 4—Explosive Substances Act (VI of 1908), s. 4 (b)—Charge, specifications of—Accused's right to know value thereof—Penal Code (Act XLV of 1860 as amended by Act VIII of 1913) ss 120, 120A, 120B, 121A—"Explosive substance"—By means thereof"—"Unlawfully and maliciously"—"Criminal conspiracy"—Misjoinder of charges—Criminal Procedure Code (Act V of 1898), ss. 196, 235, 342, 360 (1), 417—"Same transaction," limits of—Joinder of charges under s. 4 (b) of Act VI of 1908 and s. 120 B of the Penal Code—Co-conspirators, separate trial of—Crown's right to prosecute irrespective of the question of ultimate design—"Presumption of innocence" of accused, meaning of—Conspiracy charge of—Prosecution, duty of—Explanation by accused, want of, when fatal——Leading questions—Cross-examination of its own witnesses by prosecution, when permissible—Evidence Act (I of 1872), ss. 10, 14, 15, 54, 135, 143. 154—Official witnesses for Crown whether privileged from disclosing source of information—Detective, whether so privileged regarding place of secretion—Written statements of accused—Examination of accused—Comparison of handwriting by Court, propriety of—"Possession," meaning of—Depositions, reading over of, daily in open Court.* An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him. But where the accused fully understood the nature of the offence with which

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they were charged, they had clearly not been prejudiced by the omission of the words "unlawfully and maliciously" and "in British India" occurring in section 4 (*b*) of Act VI of 1908. Such an omission can be cured by the verdict. *The Queen* v. *Munslow*, [1895] 1 Q. B. 758, referred to. Where the illegal act charged under section 120 B is the unlawful and malicious possession of explosive substances within the meaning of section 4 of the Explosive Substances Act, 1908, it is not essential to specify in the charge the explosive substance which the accused have conspired to have in their possession or under their control. A person may be guilty of criminal conspiracy even though the illegal act, which he has agreed to do, has not been done, for "the crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a legal Act by illegal means." *Reg.* v. *Hibbert* 13 Cox. 82, *Quinn* v. *Leathem*, [1901] A. C. 495, *The Queen* v. *Most*, 7 Q. B. D. 244: 14 Cox. 583, and *O'Connell* v. *The Queen*, 11 Cl. & F. 155; 1 Cox. 413, 5 St. Tr. N. S. 1, referred to. The indictment in all cases of conspiracy must in the first place charge the conspiracy, but in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed. *The King* v. *Gill*, 2 B. & Ald. 204, *The Queen* v. *Kenrick*, 5 Q. B. 49, *The Queen* v. *Blake*, 6 Q. B. 126, *Sydserff* v. *The Queen*, 11 Q B. 245, *The Queen* v. *Gompertz*, 9 Q. B. 824; 2 Cox 145, *Aspinall* v. *The Queen*, 2 Q. B. D 48, *Taylor* v. *The Queen*, [1895] 1 Q. B. 25, *Reg. Parker*, 3 Q. B. 292, referred to. It is a wholesome rule that the Court should adhere to the language of the statue, as far as practicable, when a charge is drawn up; as

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nothing is gained by a paraphrase, while opportunity is afforded to the accused to take exception to the form of the charge. The accused cannot be convicted on a conspiracy charge under section 120 B, Indian Penal Code, unless the prosecution establishes that the accused were members of the conspiracy after the 27th March 1913 when Act VIII of 1913 became law. A comprehensive formula of universal application cannot be framed regarding the question whether two or more acts constitute the "same transaction"; the circumstances which must bear on its determination in each individual case are proximity of time, unity or proximity of place, continuity of action, and community of purpose or design. If A, B and C conspire to make, or have in their possession or under their control, an explosive substance within the meaning of the Explosive Substances Act, and, if in pursuance of such conspiracy A makes or has in his possession or under his control an explosive substance, they may, if the Court thinks fit, be charged and tried together under section 120 B. Indian Penal Code, and section 4 (*b*) of Act VI of 1908. If all the *known* co-conspirators named in the charge are not placed on their trial, the trial of some (separately) without the other is not vitiated. *Emperor* v. *Lalit Mohan Chuckerbutty*, I. L. R. 38 Calc. 559; 15 C. W. N. 593, explained. If the accused have committed an offence under section 4 (*b*) of the Explosive Substances Act, 1908, in pursuance of a criminal conspiracy, it is open to the Crown to prosecute them for such offences, irrespective of the question of the ultimate design of the alleged conspiracy coming under section 121 A, Indian Penal Code (which charge requires previous sanction under section 196, Criminal Procedure

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Code). In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. *R.* v. *Hodge*, 2 Lewin C. C. 227, referred to. The presumption of innocence (in criminal cases) signifies no more than this that if the commission of a crime is directly in issue in any proceeding it must be proved beyond reasonable doubt. "The whole doctrine when drawn out is, *first*, that a person who is charged with a crime must be *proved* guilty, that according to the ordinary rule of procedure and of legal reasoning, *presumitur pro reo*, *i.e.*, *negati*, so that the accused stands innocent until he is proved guilty; and *second*, that this proof of guilt must, displace all reasonable doubt." In a charge of conspiracy general evidence of the existence of the conspiracy may first be given, before particular facts are proved to show that one or more of the accused took part in it. *R.* v. *Sidney*, 9 St. Tr. 817, *Queen Caroline's Case*, 2 B. & B. 284; 1 St. Tr. N. S. 1348, *R.* v. *Hunt*, 3 B. & Ald. 566, followed. Under the law in England facts similar, but not part of the same transaction as the main fact, are not in general admissible to prove either the occurrence of the main fact or the identity of its author except (after evidence *aliunde* on these points has been given) to show the state of mind of the parties with regard to such fact, *i.e.*, knowledge of its nature, or his intent. In general, whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake, or other innocent condition of mind, evidence that the accused has been concerned in a systematic course of conduct of the same specific kind as, and proximate in point of time to that

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in quesrion, may be given *R.* v. *Holt*, (1860) Bell. 280 : 8 Cox, 411, to the contrary is no longer authority. *R.* v. *Smith*, 20 Cox. 804; 92 L. T. 208, and *Emperor* v. *Debendra Prosad*, I. L. R. 36 Calc. 573; 9 C. L. J. 610, referred to. Section 4 of Act VI of 1908 substantially reproduces the provisions of section 3 of 46 & 47 Vict. Chap. 3 (Explosive Substances Act, 1883), consequently the expression "unlawfully and maliciously" may be interpreted in the sense in which it is familiarly used in the criminal law of England. "Unlawfully" thus signifies "not for a lawful object," and "maliciously" signifies "intentionally and without justification or excuse or claim of right." *The Queen* v. *Clemens*, [1898] 1 Q. B. 556; 19 Cox. 18, *Miles* v. *Hutchins*. [1903] 2 K. B. 714; 20 Cox. 555, referred to. *Reg.* v. *Ward*, 12 Cox. 123; 1 C. C. R. 356, *McPherson* v. *Daniels*. 10 B. & C. 272, *Bromage* v. *Prosser*, 4 B. & C. 247, *Clark* v *Molyneux*, 3 Q. B. D. 237, *Allen* v. *Flood*, [1898] A. C. 1, *Johnson* v *Emerson*, L. R. 6 Ex. Ch. 373, *R.* v. *Pembleton*, 2 C. C. R. 119; 12 Cox. 607, *Mogul Steamship Co.* v. *McGregor*, [1892] A. C. 25; 23 Q. B. D. 598, followed. The term "explosive substance" as used in section 4 (*b*) of Act VI of 1908 includes *any part* of an apparatus, machine, or implement intended to be used or adopted for causing or aiding in causing any explosive substance, and "by means thereof" does not mean by means thereof *alone*. *R.* v. *Charles*, 17 Cox. 499, referred to. The inference of fact may legitimately be drawn that the "explosive substances" made and possessed by Sasanka were intended for use in British India. It is the duty of the prosecution not so much to secure a conviction as to place all the available evidence in the case fairly and fully before the

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tribunal by which alone the guilt or innocence of the accused is to be determined. *Ram Ranjan Roy* v. *King-Emperor*, I. L. R. 42 Calc. 422 ; 19 C. W. N. 28, following *Regina* v. *Holden*, 8 C. & P. 606, referred to. "The proof of the case against the prisoner must depend for its support not upon the absence or want of any explanation on the part of the prisoner, but upon the positive affirmative evidence of his guilt that is given by the Crown." But "if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon, for his own sake and his own safety, to state and to bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence." *Regina* v. *Frost*, 4 St. Tr. N. S. 85, followed. While it is not necessary to prove manual possession of the explosive substance by the accused, it must be proved that it was in his power or control : *possession* to be punishable must also be possession with knowledge and assent. The mere fact that the other accused were in the room does not show they were in possession of all or any of the things contained therein. When the evidence at the disposal of the prosecution is insufficient to secure a conviction for the crime committed, it is inexpedient, even though it may be lawful, to prosecute the accused for a conspiracy the proof whereof really rests on the establishment of that very crime. *Reg.* v. *Boulton*, 12 Cox 87, and *Emperor* v. *Lalit Mohan*, I. L. R. 38 Calc. 559 ; 15 C. W. N. 593, referred to. A man's guilt is to be established by proof of the facts alleged and not by proof of his character ; such evidence might create a prejudice but not lead a step towards substantiation of guilt. In India, as in England, the accused

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are entitled in cross-examination to elicit facts in support of their defence from the prosecution witnesses wholly unconnected with the examination-in-chief. In the course of cross-examination of this character the defence are entitled, in view of the generality of section 143 of the Indian Evidence Act, to ask leading questions. Under section 154, the Court has the discretion to permit the prosecution to test, by way of cross-examination, the veracity of their own witnesses wtih regard to the (unconnected) matters elicited by the defence in cross-examination. [While in the United States a party has no right to cross-examine any witness, except as to circumstances connected with matters stated in his examination-in-chief, and if he wishes to examine him respecting other matters he must do so by making him his own witnsss and by calling him as such in the subsequent progress of the cause. *Philadelphia and Trenton Railway Co.* v. *Stimpson*, 14 Peter 448, referred to.] The defence is not entitled to elicit from individual prosecution witnesses whether he was a spy or an informer, or to discover from police officials the names of persons from whom they had received information ; but a detective cannot refuse, on grounds of public policy, to answer a question as to where he was secreted. *R.* v. *Watson*, 32 St. Tr. 1, *R.* v. *Richardson*, 3 Fos. & Fin. 693, *A.-G.* v. *Bryant*, 15 M. & W. 169 ; 71 R. R. 610, *Marks* v. *Beyfus*, 25 Q. B. D. 494, *Webb* v. *Catchlove*, 3 T. L. R. 159, referred to. In strictly carrying out the provisions of section 360 (*1*) of the Criminal Procedure Code by the daily reading over in open Court of the deposition of each witness, the Court does not lay itself open to criticism, though that procedure should occupy considerable time. *Mohendra Nath* v. *Emperor*, 12 C. W. N. 845, *Jyotish Chandra*

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Mukerjee v. *Emperor*, I. L. R. 36 Calc. 955, and *Kamatchinathan* v. *Emperor*, I. L. R. 28 Mad. 308, referred to. Though written statements may be accepted from the accused in accordance with the universal practice in the Courts under the Calcutta High Court, they do not take the place of evidence nor of such examination of the accused as is contemplated by section 342 of the Code of Criminal Procedure. *Emperor* v. *Ansuiya*, (1903) All. W. N. 1, dissented from. AMRITA LAL HAZRA *v.* EMPEROR (1915) I. L. R. 42 Calc. 957

Charter Act (24 & 25 Vic. c. 105) s. 15 : *See* JURISDICTION 926

Charter of the Supreme Court, 1774, cl. 26 : *See* ARREST OF SHIP ... 85

Chattels : *See* PALAS OR TURNS OF WORSHIP 455

Chaukidari Chakran Lands—*Village Chaukidari Act (Beng. VI of 1870) ss. 1, 48, 49, 50, 51, 52, 58—Power of resumption and assessment of chaukidari chakran lands—Zamindari estates in Orissa—Regulation XII of 1805, s. 33—Regulation XIII of 1805, s. 41—Regulation I of 1793, s. 8, cl. (4)—Onus of proof.* In these appeals, the Judicial Committee (affirming the decision of the High Court) *held*, on a consideration of the history of Orissa, and of the legislation applicable to its settlement, and the nature of its zamindari estates, that the Government were, under the circumstances, not entitled to resume and assess with revenue, as being chaukidari chakran lands within the meaning of the Village Chaukidari Act (Bengal Act VI of 1870) certain lands forming part of the estates of the respondents (the zamindars of Sukinda and Madhupur) in Orissa, with whose ancestors settlement had been made in 1803, and sanads granted by which statutory confirmation was given by section 33 of Bengal Regulation XII of 1805, and in

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respect of which estates the revenue was settled in perpetuity. The history of chaukidari grants as set out in the judgment of Lord Kingsdown in the case of *Joykishen Mookerjee* v. *Collector of East Burdwan*, 10 Moo. I. A. 16, referred to. The respondents in discharge of the duties imposed on them by their sanads to maintain peace and order within their estates (the manner in which they were to carry out such duites being impliedly left by the Government to the zamindars, as there was no machinery provided for the purpose in the legislation previous to 1870) retained in their service a large number of chaukidars whom, according to the custom of the country, they remunerated by grants of land in lieu of wages. A register of these chaukidars was kept in the zamindari office, and in the appointment of the chaukidars, in more than one instance, the Government Police Officer had a voice. But the records showed that the zamindars often changed the lands held by these men, and resumed what they considered to be in excess of their requirements. Bengal Act VI of 1870 was extended to Orissa in 1879 In suits by the respondents against the Secretary of State for a declaration that the Act did not apply to the lands in question :—*Held*, that the onus was on the appellants to show that when the zamindaries were confirmed to the respondents' ancestors, such confirmation was subject to reservations in respect of any land which gave the Government the power of resuming and assessing it, and that onus had not been discharged. The power of resumption was reserved by Government in the old Regulations in respect of lands which had been set apart by the zamindar with their permission or under their authority. In Regulation I of 1793 the word used is "appropriated"; in Regulation

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XIII of 1805 the expression "assigned" is employed: but in both statutes the characteristics of the grants under which the lands were held, depended on the implied authorisation of the Government, which excluded them from consideration in the adjustment of the jama of the mahal. In the present cases the appellant had failed to show that any parcel of land was not taken into account in fixing the rent respectively payable by the respondents, nor that there was any obligation on the part of the respondents to make such grants. The only obligation on them was to maintain peace and order within their zamindaries. They entertained the services of chaukidars for whose maintenance they allotted from time to time certain lands of their own free will. The mere fact that some appointments were made with the approval of a Government official, could not alter the nature of the grants. The word 'assigned" in the definition section of Bengal Act VI of 1870 means land assigned by Government, or appropriated under their authority or with their permission. Not only did the form of the "transferring order" in Schedule C of the Act clearly show that the expression "assigned" is applied to lands assigned by Government for the maintenance of the chaukidars, and in respect of which they reserved the right to resume and transfer to the zamindar subject to an additional assessment, but the resolution by which the Act was extended to Orissa leaves no possibility of doubt what the Government understood the Act to mean. In the orders passed a distinction is made with regard to chaukidari holdings in the temporarily-settled tracts and those situated in "permanently-settled estates." With regard to these it is declared that on resumption "the holdings should be included in the estatee within which they lie, and form part of its assets in the future." Nothing can be clearer that the Act was designed to deal with lands which, although lying within a mahal, did not form part of its assets, which was not the case with the respondents' zamindaries, SECRETARY OF STATE FOR INDIA *v.* KIRTIBAS BHUPATI HARICHANDAN MAHAPATRA (1914) I. L. R. 42 Calc. 710

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Cheque, payment by—*Effect of such payment — Part-payment—Limitation—Limitation Act (IX of 1908), s. 20—Continuous account.* If a cheque is delivered to a payee by way of payment and is received as such, it operates as a payment subject to a condition subsequent that if upon due presentation the cheque is not paid, the original debt revives. Where such a cheque is signed by the debtor and paid in part-payment of the principal of a debt, the cheque being subsquently honoured, the proviso to s. 20 of the Limitation Act has been complied with. *Mackenzie* v. *Tiruvengadathan*, I. L. R. 9 Mad. 271, distinguished. Where the dealings between two parties give rise to a continuous account, the whole forms one cause of action. *Bonsey* v. *Wordsworth*, 18 C. B. 325, followed. KEDAR NATH MITRA v. DINABNDHU SAHA (1915) I. L. R. 42 Calc. ... 104

Chota Nagpur Encumbered Estates Act (Beng. VI of 1876) s. 17: *See* PATNI LEASE 102

Chukani Right—*Contract of sale of a chukani tenure—Misrepresentation by non-disclosure of facts—suit for rescission by purchaser—Transfer of Property Act IV of 1882, s. 55—Duty of seller.* A *chukani* tenure in the District of Rungpur is not a temporary tenure under the Transfer of Property Act terminable at six months' notice, but a *raiyati* leasehold which may develop into occupancy right. When the vendor

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is informed by the purchaser of his object in buying certain property and the lease contains covenants which will defeat that object, mere silence will, in equity, be equivalent to misrepresentation. *Flight* v. *Barton* 3 My. & K. 282, followed. JOGENDRA NATH GOSWAMI *v.* CHANDRA KUMAR MOZUMDAR (1914) I. L. R. 42 Calc. 28

Civil Courts Act (XII of 887) ss. 8, Sub-s. (2), 22, Sub-s. (2): *See* TRANSFER 842

Civil Procedure Code (Act XIV of 1882), s. 244: *See* OCCUPANCY HOLDING ... 172

ss. 626, cl. (b), 629 : *See* REVIW ... 830

Civil Procedure Code (Act V of 1908), ss. 2 (2), 96, 104 ; O. XLIII, r. 1 : *See* EXECUTION OF DECREE ... 440

s. 10 : *See* JURISDICTION ... 926

s. 15 : *See* JURISDICTION ... 942

s. 47, O. XXI, rr. 58, 60 : *See* EXECUTION OF DECREE—SHEBAIT 440

ss. 47, 73 : *See* RATEABLE DISTRIBUTION 1

s. 73 : *See* CO-OPERATIVE SOCIETY ... 377

s. 92, O. I., r. 3 : *See* PARTIES ... 1135

s. 97 : *See* APPEAL 914

s. 99 : *See* HINDU LAW—RELIGIOUS ENDOWMENT 536

s. 102 : *See* HOMESTEAD LAND ... 638

s. 107, O. XLI, r. 4, application of : *See* COSTS 451

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Civil Procedure Code (Act V of 1908), s. 151 O. XLI, rr. 1. 11 : *See* APPEAL 433

O. V., rr. 15, 17, 27 : *See* SUMMONS 67

O. XXI, rr. 35, 97: *See* BAILIFF ... 313

O. XXXIV, *See* PALAS OR TURNS OF WORSHIP 455

O. XXXIV, r. 1 : *See* HINDU LAW—MORTGAGE 1068

O. XXXIV, rr. 3, 6 : *See* LIMITATION 294

O. XXXIV, rr. 4, 5 : *See* LIMITATION 776

O. XXXIV r. 14: *See* MORTGAGE ... 780

O. XXXVII, r. 2 : *See* APPEAL ... 735

O. XLVII, r. 27 ; O. XLVII, r. 1 ... 675

O. XLVII rr. 4, 7 : *See* APPEAL ... 433

O. XLVII, rr. 4 (b) (2), (b) 7 (1) (b) : *See* REVIEW 830

Co-conspirators, separate Trial of : *See* CHARGE 957

Co-operative Societies Act (II of 1912) ss. 19, 20 : *See* CO-OPERATIVE SOCIETY 377

Co-operative Society—*Charge—Priority—Co-operative Societies Act (II of 1912), ss. 19, 20—Attachment—Civil Procedure Code (Act V of 1908), s. 73.* Under s. 73 of the Code of Civil Procedure the claim of a co-operative society cannot be enforced unless they have a decree or charge under s. 20 of the Co-operative Societies Act (II of 1912), though under s. 19 of that Act the society might have raised an objection to the attachment by reason of other sections of the Code of Civil Procedure. ABDUL QUADIR *v.* SHAHBAZPUR CO-OPERATIVE BANK (1914) I. L. R. 42 Calc. ... 377

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Collector : *See* INCOME TAX ... 151

Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. C. 27, ss. 2 (3)(a), 35 : *See* ARREST OF SHIP ... 85

Commercial Intercourse with Enemies Ordinance (VI of 1914) s. 3 : *See* TRADING WITH THE ENEMY ... 1094

Commission : *See* PARDANASHIN, EXAMINATION OF 19

Commitment : *See* APPROVER ... 856

——— *Duty of Magistrate to examine witnesses not produced but whom the accused is prepared to produce after process—Application to summon witnesses and for time to file documents made after the commitment order—Criminal Procedure Code (Act V of 1898), s. 208—Practice.* A Magistrate is bound, before passing an order of commitment, to examine all the witnesses produced by the accused but not those whom he is prepared to produce after process obtained for their appearance. *Queen-Empress* v. *Ahmadi*, I. L. R. 20 All. 264, referred to. *Emperor* v. *Muhammad Hadi*, I. L. R. 26 All. 177, dissented from. A Magistrate does not act illegally, under s. 208 of the Criminal Procedure Code, in refusing an application for summons on witnesses and for time to file documents made after the order of commitment has been passed. EMPEROR *v.* SURATH (1914) I. L. R. 42 CALC. ... 608

Company : *See* PROVIDENT INSURANCE ... 300

Compensation for Wrong to Land : *See* JURISDICTION 942

Complainant:—*Absence of complainant—Cause called on by mistake on date not fixed for hearing—Order of acquittal—Effect of such order—Jurisdiction of Magistrate to proceed with trial thereafter—Criminal Procedure Code (Act V of 1898), s. 247.* An order of acquittal under s. 247 of the Criminal Procedure Code passed by mistake on a date not fixed for the hearing of the case, for absence of the complainant,

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is a mere nullity, and does not debar the Magistrate from proceeding with the trial on the discovery of the error. *H. C. Proceedings, 17 Aug. 1875*, 2 Weir 307, followed. *Suresh Chandra Sinha* v. *Banku Sadhukhan*, 2 C. L. J. 622, distinguished. ACHAMBIT MANDAL *v.* MAHATAB SINGH, (1914) I. L. R. 42 CALC. 365

Complaint—*Personal presentation of complaint—Complaint of defamation presented by alleged agent of pardanashin but not signed by her—Power of attorney not filed in Court—Necessity of examination of complaint before issue of process—Examination of pardanashin on commission—Criminal Procedure Code (Act V of 1898), ss. 198, 200, 503*—"*At once.*" The words "at once" in s. 200 of the Criminal Procedure Code clearly indicate that a complaint must ordinarily be presented in person; otherwise a Magistrate should be very loath to take cognizance, and should not accept a complaint, not signed by the alleged complainant, and not preferred by a person duly authorized to institute the specific complaint. No process can be issued against the accused, either by the Magistrate first taking cognisance, or by the Magistrate to whom the case is transferred, unless and until the Magistrate issuing it has first examined the complainant, and this course is the more necessary in the case of a *pardanashin* to enable the Magistrate to satisfy himself that the complaint is really her action. When a *pardanashin* makes a complaint, the Magistrate may take cognisance, if satisfied that it is really her complaint, by whatever means it reaches him. When it is presented on her behalf the Magistrate may, under s. 503 of the Code, issue a commission for the examination required by s. 200. Section 503 is very wide in its terms, and

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refers not only to an inquiry or trial but to any other proceeding, and authorises the examination of any "witness," which includes a complainant. Where a written complaint of defamation was presented by an alleged agent on behalf of a *pardanashin*, but it was not signed by her, nor was any power of attorney filed before the Magistrate, and he issued process without examining the complainant: *Held*, that he had no power to issue process in such a case. ABHAYESWARI DEBI *v.* KISHORI MOHAN BANERJEE (1914) I. L. R. 42 Calc. 19

Compromise—*Compromise of suit relating to mortgages—Agreement of compromise not registered and not incorporated in decree—Suit for redemption of mortgages—Agreement for extinction of equity of redemption and for division of properties amongst the parties to mortgage deeds—Agreement of compromise given effect and carried out by acts and conduct of parties though document is ineffective to prove contract—Principle that Court will uphold a contract carried into effect by acts and conduct of parties.* In this case the Judicial Committee (affirming the decision of the High Court), *held*, in a suit for the redemption of two mortgages executed in 1848 and 1871 respectively between the predecessors in title of the parties, that the equity of redemption had, under the circumstances, been extinguished. In 1870 an agreement was come to by the then representatives of the mortgagor and mortgagee in reference to the mortgage of 1848. Sums were fixed as being the principal and the interest due, and arrangements were made for payment by yearly instalments, and for the management of the property. In 1873 differences arose between the parties to that agreement and the mortgagee brought a

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suit to enforce it which was compromised, the terms of the agreement being in effect to pay off the mortgage debts and to divide the properties into specific shares which were to be legally conveyed by the mortgagor to the parties respectively entitled to them, and a decree was made by the Court that "the suit be decided in pursuance of the terms of the compromise, and the suit be struck off from the list of cases. No conveyances were executed by the mortgagor in completion of the contract to that effect in the compromise, nor was the agreement of compromise, registered nor its terms incorporated into the decree: but it was acted upon and carried out by all the parties to it, and by their successors in title, and for a period of 30 or 40 years prior to the present suit the rights of all the parties had been dealt with upon the same footing as if the mortgagor had made an express conveyance parting with the equity of redemption, and transferring allotted shares of the property itself to the mortgagees, and reserving one share for herself. *Held*, that if the agreement of compromise was defective as not being registered, the decree had been obtained only on one footing, namely that the parties to the suit had in fact arranged their rights in the property in terms of the compromise. And even though the compromise and the decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption, the acts of the parties had been such as to supply all defects. When the actings and conduct of the parties are founded upon, as in the performance or part-performance of an agreement the *locus penitentiæ* which exists in a situation where the parties stand upon nothing but an engagement which

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is not final or complete, is excluded. For equity will support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. The principles laid down in *Maddison* v. *Alderson*, L. R. 8. A. C 467, Bells Commentaries, 10th Ed., section 26, and *Pratt* v. *Parker*, 1 Ves. Sen. 437, followed. There was nothing in the laws of India inconsistent with these principles; on the contrary, those laws followed the same rule. MOHAMED MUSA v AGHRE KUMAR GANGULI (1914) I. L. R. 42 Calc. 801

Computation of Time: *See* LEAVE TO APPEAL TO PRIVY COUNCIL ... 35

Conditional Order: *See* PUBLIC NUISANCE 702

Confession by Co-accused: *See* BAIL 25

Confessions of Accused: *See* JURY TRIALS 789

Confiscation—*Cargo—Enemy ship—Cargo shipped by British subjects before declaration of war—War declared whilst cargo at sea—Cargoes consigned to German merchants (in one instance to British merchant)—Destination (Enemy Port)—Contracts C. I. F.—Moneys advanced by British Banks against documents of title—Property in goods at the time of capture.* On August 4th 1914, war was declared between Great Britain and Germany. Before the declaration of war H. S. N. C. & Co., British subjects, had shipped some bales of jute by a German ship, the S.S. *Rappenfels*, of the Hansa Line, and had consigned the goods to D. C. & Co., British merchants. G. & Co. and G. W. & Co. had also shipped goods by the same ship but had consigned the goods to German merchants. The *Rappenfels* was captured at sea after the declaration of war and condemned as good and lawful prize at Colombo. The *Rappenfels* was sent to Calcutta to have the

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liability of the cargo to condemnation determined by the High Court at Fort William in Bengal. Messrs. H. S. N. C. & Co., G. & Co., and G. W. & Co. submitted claims for the release of their goods. These claims were disputed by the Crown:—*Held*, (i) that in determining the question of liability of the goods to confiscation, regard must be had to the property in the goods and not to the risk except so far as it may assist the Court in determining the answer to the question—"To whom did the goods belong at the time of capture"? (ii) that the sellers did not pass the property in the goods to the buyers at the time of appropriating the goods to the contract; and (iii) that in the circumstances the property in the goods was in the sellers, and they were not liable to be confiscated. RE CARGO ex S.S. "RAPPENFELS" (1914) I. L. R. 42 CALC. ... 334

Consent of Court: *See* MAHOMEDAN LAW—MARRIAGE 351

Consent of Landlord: *See* TRANSFERABILITY 172

Consent of Parties: *See* JURISDICTION 116

Consolidated Rate: *See* RATES AND TAXES 625

Conspiracy: *See* CHARGE 957

Construction: *See* HINDU LAW—WILL 561

Constructive Notice: *See* RATES AND TAXES 625

Contempt of Court—*Practice—Appeal—Assisting in contempt—Procedure.* Where the prohibitory injunction on the defendant firm made no mention of M, an assistant, or of servants and agents, but the notice of motion for committal for breach thereof was upon M who did nothing after service on him of the injunction. *Held*, that the notice of motion was erroneous, and the procedure which had been adopted was misconceived: the proceedings against M, if any, should have been

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for *assisting* in a contempt of Court. *Held*, also, (on the merits) that there had been no contempt or participation in contempt on M's part, as all that he did had been done prior to the injunction. MARSHALL *v.* GRANDHI VENKATA RATNAM (1915), I. L. R. 42 CALC. 1169

Contentious Matter : *See* INSOLVENCY ... 109

Continuous Account : *See* CHEQUE, PAYMENT BY 1043

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——— : *See* COMPROMISE ... 801

——— : *See* UNDUE INFLUENCE ... 286

Contract Act (IX of 1872), ss. 16, 19 : *See* UNDUE INFLUENCE ... 286

———, **ss. 15, 74, illus. (*f*) :** *See* INTEREST 652, 690

———, **s. 37 :** *See* DAMDUPAT, RULE OF 826

———, **s. 72 :** *See* INCOME TAX 151

———, **s. 230 (*2*) :** *See* SALE OF GOODS 1050

Contract of Employment : *See* BROKER... 1050

Contract C. I. F. : *See* CONFISCATION ... 334

Conveyance by Executor : *See* VENDOR AND PURCHASER 56

Conviction : *See* EVIDENCE ... 784

Corroboration : *See* CONFESSIONS OF CO-ACCUSED 789

Costs—*Partition—Civil Procedure Code (Act V of 1908), s. 107, O. XLI, r. 4, application of—Appellate Court power of.* It is not necessary for the application of O. XLI, r. 4 of the Code of Civil Procedure that the decree should proceed on every ground common to all the plaintiffs or defendants It is quite sufficient if it proceeds on any ground common to the party to which the appellant belongs. Under s. 107 of the Code, the Appellate Court has the same power as the Court of first instance. *Shama Soonduree Debia* v. *Jardine Skinner & Co.* 12 W. R. 160, *Dildar Ali Khan* v. *Bhawani Sahai Singh*, I. L. R. 34 Calc. 878, and *Ram Kamal Saha* v. *Ahmad Ali*, I. L. R. 30 Calc. 429, referred to. AMBIKA PRASAD SINGH *v.* PERDIP SINGH, (1914) I. L. R. 42 CALC. 451

Court, duty of : *See* INTEREST ... 690

Court-fee :—*Plaint—Valuation of Suit—Court Fees Act (VII of 1870), s. 7, sub-s. (4), cl. (c).* In a suit for a declaration that a decree for over 22,000 was bad and might be set aside, the plaintiffs, who were interested only in three-annas share of the property which was valued at Rs. 9,000, were required to pay court-fee for the whole of the decretal amount :—*Held*, that the plaintiffs must value their suit according to the extent of their claim and the court-fee need therefore be paid only upon the amount. *Phul Kumari* v. *Ghanshyam Misra*, I. L. R. 35 Calc. 202, and *Harihar Prasad Singh* v. *Shyam Lal Singh*, I. L. R. 40 Calc. 615, referred to. GANESH BHAGAT *v* SARADA PRASAD MUKHERJEE (1914) I. L. R. 42 CALC. 370

Court Fees Act (VII of 1870), s. 7 Sub-s. (4) Cl. (c) : *See* COURT-FEE ... 370

Criminal Case : *See* APPEAL ... 374

Criminal Cases, Appeal in : *See* PRIVY COUNCIL, PRACTICE OF ... 739

Criminal Conspiracy : *See* CHARGE ... 957

——— **Proof of :** *See* MISJOINDER OF CHARGES ... 1153

Criminal Procedure Code (Act V of 1898), s. 75 (*1*) : *See* WARRANT, VALIDITY OF 708

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Criminal Procedure Code (Act V of 1898).

s. 195: *See* SANCTION FOR PROSECUTION 667

ss. 196, 235, 342, 360 (1), 417: *See* CHARGE 957

ss. 198, 200, 503: *See* COMPLAINT ... 19

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ss. 359 (1), 476: *See* PERJURY ... 240

s. 423: *See* APPEAL 374

s. 423: *See* TRADING WITH THE ENEMY 1094

ss. 435, 439, 491: *See* EXTRADITION WARRANT 793

s. 439: *See* ACQUITTAL ... 612

ss. 497, 498: *See* BAIL ... 25

Crown, right of, to prosecute: *See* CONSPIRACY 957

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—— **assessment of:** *See* PRACTICE 819

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Damdupat, rule of—*Mortgage between Hindus, whether the rule of Damdupat applies to—Transfer of Property Act (IV of 1882) s. 4—Contract Act (IX of 1872) s. 37.* There is nothing in the Transfer of Property Act (read with the Contract Act) to preclude the rule of Damdupat from applying to mortgages between Hindus. *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu*, I. L. R. 26 Mad. 662, not followed. *In the matter of Hari Lall Mullick*, I. L. R. 33 Calc. 1269, *Nanda Lal Roy* v. *Dhirendra Nath Chakravarti*, I. L. R. 40 Calc. 710, *Jeewanbai* v. *Manordas Lachmondas*, I. L. R. 35 Bom. 199, and *Sundarabai* v. *Jayavant*, I. L. R 24 Bom. 114, referred to. KUNJA LAL BANERJI *v.* NARSAMBA DEBI (1915) I. L. R. 42 Calc. 826

Darbhanga Raj: *See* HINDU LAW—CUSTOM 582

Death, sentence of: *See* PRIVY COUNCIL, PRACTICE OF 739

Debt—*Charge—Assignment—Transfer of Property Act (IV of 1882), s. 55, sub-s. (4).* There is no authority for the contention that a charge such as the one mentioned in s. 55, sub-s. (4) of the Transfer of Property Act, is merely a personal right which cannot be transferred to an assignee. The debt could undoubtedly be transferred and there is no reason why the security for the debt should not also be transferred with it. *Hari Ram* v. *Denaput Singh*, I. L. R. 9 Calc. 167, and *Moti Lal* v. *Bhagwan Das*, I. L. R. 31 All. 443, distinguished. SHEONANDAN LAL *v.* ZAINAL ABDIN (1914) I. L. R. 42 Calc. ... 849

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Deposition: *See* PERJURY—WITNESS ... 240

Depositions, reading over of: *See* CHARGE 957

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Destination: *See* TRADING WITH THE ENEMY 1094

Detective, privilege of: *See* CHARGE ... 957

Disbelief: *See* EVIDENCE 784

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Dispute concerning land—*Evidence not recorded according to law, but memorandum taken down and signed by the Magistrate personally—Legality of final order—Criminal Procedure Code (Act V of 1898) ss. 145, 356 (1) and (3).* The provisions of sub-section (*1*) of s. 356 are mandatory. Sub-section (*3*) applies only where evidence has been recorded in accordance with sub-section (*1*) but not personally by the Magistrate. Where the Magistrate did not take down the evidence himself nor was it taken down in his presence and hearing and under his personal direction and superintendence nor signed by him, but he made a memorandum thereof and signed the same:—*Held*, that the provisions of s. 356 had not been complied with, and that the order declaring the opposite party to be in possession was bad in law. SADANANDA MANDAL *v.* KRISHNA MANDAL (1914) I. L. R. 42 Calc. ... 381

Dissolution of Partnership: *See* APPEAL 914

——————— *See* MINOR 225

District Judge, transfer by: *See* TRANSFER 842

Doctrine of Protection: *See* OCCUPANCY HOLDING 745

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Easement—*Light and Air—Ancient light, infringement of—Nuisance—Measure of right—Requirement of light for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind—Concurrent findings of fact—Grounds of Appeal relating not to fact, but to pure question of law.* In this case which was an appeal in an action for damages for the infringement of the appellant's alleged rights of light and air, the Judicial Committee held that though there were concurrent findings of facts in the Courts below, yet the grounds of appeal did not relate to those findings but to the question whether the Courts below had taken the proper view of the legal rights of the appellants, and whether, accordingly, the test which they had applied on the question of the infringement of the appellants' rights was the correct one. That was a pure question of law which admittedly turned upon the interpretation to be given to the decision of the House of Lords in *Colls* v. *The Home and Colonial Stores*, [1904] A. C. 179, when considered in connection with the later decision of the House of Lords in *Jolly* v. *Kine*, [1907] A. C. 1. *Held*, further, that in *Colls' Case*, [1904] A. C. 179, the legal test in such an action was formulated by Lord Davey as being that "the owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or buisiness of the tenement according to the ordinary notions of mankind. . . . The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance," and the House of Lords in that case adopted that formulation of the law. In the

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Easement—*concld.*

judgment of the House of Lords in *Jolly* v. *Kine*, [1907] A. C. 1, three was an authoritative exposition of the decision in *Colls' Case*, [1904] A. C. 179 and it was established that the law as stated by Lord Davey is the law as laid down by that decision, and that it accurately formulated the law on the subject. In the High Court, in the present case, the Court of first instance adopted Lord Davey's opinion and applied it consistently to the findings of fact to which he came; and the appellate Court had substantially taken the same test. Their Lordships, therefore, affirmed the judgments of the Courts below, and dismissed the appeal. PAUL *v.* ROBSON (1914) I. L. R. 42 Calc. ... 46

———*Prescriptive right to take water by means of definite mode of access—Whether owner of servient tenement may substitute some other means of access.* When the owner of a dominant tenement has acquired a prescriptive right to take water from a tank on the servient tenement, and has for this purpose used a particular means of access for the statutory period, he has acquired a right to reach the water by means of such definite mode of access: the servient owner, at his own discretion, may not substitute for his use some other means of access. JIBANANDA CHAKRABARTY *v.* KALIDAS MALIK, (1914) I. L. R. 42 Calc. 164

Embankment Act (Beng. II of 1882): *See* SALE FOR ARREARS OF REVENUE ... 765

———**Charges:** *See* SALE FOR ARREARS OF REVENUE ... 765

Embarrassment of Debtor: *See* INTEREST 652

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Evidence: *See* DISPUTE CONCERNING LAND 381

———*See* HINDU LAW—RELIGIOUS ENDOWMENT 536

———*See* PUBLIC PROSECUTOR, DUTY OF 422

———*See* RECEIPT 546

———*Disbelief of greater part of the evidence of the prosecution witnesses—Conviction on the residue—Propriety of the conviction—Practice.* When the prosecution witnesses are found to be untruthful as to the greater part of their evidence, it would be dangerous to convict the accused on the residue without corroboration. HARI KRISHNA *v.* EMPEROR (1914) I. L. R. 42 Calc. 784

———**Act (I of 1872), ss. 10, 14, 15, 54, 135, 143, 154:** *See* CHARGE ... 957

———**(I of 1872) s. 92:** *See* RECEIPT 546

———**117:** *See* TRADE-MARK 262

Exclusion of Females: *See* HINDU LAW—INHERITANCE 1179

Execution of Decree—*Shebait—Claim preferred by successor in office of judgment-debtor (adverse to his own interests) as the legal representative—Order made, whether under scope of Civil Procedure Code (Act V of 1908), s. 47 or O XXI, rr. 58, 60—Appeal therefrom, competency of—Civil Procedure Code (Act V of 1908), s. 2 sub. s. (2), ss. 96, 104; O. XLIII, r. 1.* Where X in execution of a decree for money against Y as shebait of a deity attached and proceeded to sell properties of which Y or his successor in office had alleged that he was in possession, not as shebait of the deity, but in his own right: *Held*, that the case did not fall within the scope of section 47 of the Civil Procedure Code of 1908 as Y in his character of shebait, the only character in which he was a party to the suit, could not rightly

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be deemed the same person in his character as a private individual. *Kartick Chandra Ghose* v. *Ashutosh Dhara*, I. L. R. 39 Calc. 298, followed. That the order of the original Court must be taken to have been made under r. 60 of O. XXI, which recognised a broad distinction between the representative character and the personal character of the same individual: and that, in consequence, the appeal to the Subordinate Judge was incompetent. *Punchanun v. Rabia Bibi*, I. L. R. 17 Calc. 711, distinguished and explained. *Per* MOOKERJEE J. When X in execution of a decree for money against Y seeks to proceed against Z as the legal representative of Y who is liable only to the extent of the assests of Y in his hands, and a question arises whether a particular property does, or does not, constitute such assets, it must be determined by the Execution Court under section 47 of the Code. *Per* BEACHCROFT J. If the claim of the objector is really in his own interest as representative of the judgment-debtor, the case will come under section 244 (of the Code of 1882); if the claim is adverse to his interest as representative, it will not. UPENDRA NATH KALAMURI *v.* KUSUM KUMARI DASI (1914) I. L. R. 42 Calc. ... 440

Executor, conveyance by: *See* VENDOR AND PURCHASER 56

Executor, liability of: *See* INCOME TAX 151

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Explosive Substances Act (VI of 1908) s. 4 (b): *See* CHARGE 957

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Extradition Act (XV of 1903) ss. 7, 15: *See* EXTRADITION WARRANT ... 793

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Eye-witnesses: *See* PUBLIC PROSECUTOR, DUTY OF 422

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Females, exclusion of: *See* DARBHANGA RAJ 582

Finding of Fact: *See* REMAND ... 888

Fire-arms, parts of: *See* MISJOINDER OF CHARGES 1153

First Charge: *See* RATES AND TAXES ... 625

Fishery—*Right of jalkar or fishery in tidal navigable river in Bengal—River forming new channel not gradually but suddenly—Right of grantee of jalkar to follow the river where the subjacent soil does not belong to his grantor, the Crown, but to a riparian proprietor—Grant of rights by the Crown—Proof of title when no actual grant is in existence—Jalkar in existence from before the permanent settlement—English law of waters—Alluvion—Regulation XI of 1825.* The appellants claimed, as proprietors of a several jalkar or fishery in certain tidal navigable waters in Eastern Bengal, a decree for possession of an exclusive fishery in a portion of a suddenly and newly formed river channel as falling within the upstream and downstream limits of their several fishery, and alleged that the respondents were trespassers when they fished in it. The respondents pleaded their right to fish in a portion of the channel, of which they owned both the bed and the banks, as owners of the subjacent soil. There was no actual grant proved but the appellants produced documentary evidence which showed the existence of the jalkar as appertaining to their zamindari from before the Permanent Settlement. *Held*, that original grants of jalkar prior to the Permanent Settlement are but rarely forthcoming, and resort must be had to secondary evidence of them, or to the inference of a legal origin to be drawn from long user. *Horidas Mal* v. *Mahomed Jaki*, I. L. R. 11 Calc.

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434, per Garth C.J. ; and the rule in *Fitzwalter's Case*, 3 Keble 242, that the evidence of a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear, followed. *Held*, in the present case, so far as such evidence can now be expected to be forthcoming as to particular grants more than a century old, the evidence was sufficient to show that the competent authority—the Government of India in right of the Crown—did actually grant to the appellants' predecessors in title or settle with them so as in effect to grant a jalkar right of several fishery in certain of the waters of the Ganges system in this suit. *Held*, also, (following a numerous body of decisions in the Indian Courts) that it must now be taken as decided in Bengal that the Government grantee of a jalkar right can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters of the river system within the upstream and downstream limits of his grant, whether the Government owns the soil subjacent to such waters as being the long-established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment. The whole series of decisions in Bengal on the subject from 1807 to 1905 reviewed and discussed. The English common law admittedly does not apply to the mofussil of India, yet the Indian Courts have in many respects followed the English law of waters ; and their Lordships have given careful consideration to the arguments that principles established under and for English conditions afford a sound guide to the rules which should be enforced in India ; though they would in any case be slow to disturb decisions by which rules have been established for Bengal governing exclusive and important rights such

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as rights of jalkar, and unless they could be shown to be manifestly unjust or flagrantly inexpedient, their Lordships would not supersede them. The analogous rule in the United Kingdom connecting the subject's right to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership of the subjacent soil, is the result of conditions partly historical and partly geographical which have no counterpart in Lower Bengal, where above all the difference, indeed the contrast, of physical conditions is capital. By no analogy can rules applicable to the small, slow-running and comparatively unchanging rivers of England be profitably applied to such differing conditions. In the case of alluvion as applied to rights of jalkar, and the argument that the right to follow the river ought to be limited to cases where the river encroachments were gradual, and should not be extended to an irruption as sudden and rapid as was the formation of the new channel in the respondents' lands, the Indian law, doubtless guided by local physical conditions has adopted in Regulation XI of 1825, sections 1 and 4, a rule varying somewhat from the rule established in England, and the anology of the English law can hardly be called in aid when Indian legislation has thus an established and different rule on the same subject. As to the Indian rule working injustice in that a landowner not only loses the use of his land when the river overflows it, but also the right to fish over his own acres in order that another may unmeritoriously fish in his place, which cannot occur under the English rule, there is no such proof that one rule is better than the other as would even approach the conclusion that the rule established in India should be

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set aside. SRINATH ROY *v.* DINABANDHU SEN (1914) I. L. R. 42 Calc. 489

Fitness: *See* SURETY 706

Force, use of: *See* BAILIFF ... 313

Forfeiture: *See* PARDON .. 756, 856

Forfeiture—*Press Act (I of 1910), s. 4 (1)—Order made by Local Government of Delhi—Jurisdiction—Delhi Laws Act (XIII of 1912).* Where an order was made under section 4 (*1*) of the Indian Press Act, 1910, by the Local Government of Delhi, directing the forfeiture wherever found of all copies of a newspaper published on a certain date in Delhi, on an application to set aside the order made by a person who had in his possession in Calcutta a particular copy :—*Held* that this High Court had no jurisdiction to entertain the application. *In re* ABUL KALAM AZAD (1915) I. L. R. 42 Calc. 730

Garden: *See* HOMESTEAD LAND ... 638

Gift: *See* MAHOMEDAN LAW ... 361

Gift-over: *See* HINDU LAW—WILL ... 561

Goods, property in, at the time of Capture: *See* CONFISCATION ... 334

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Goodwill: *See* TRADE-MARK ... 262

Governor-General in Council, powers of: *See* LEAVE TO APPEAL TO PRIVY COUNCIL 35

Grant: *See* MINERAL RIGHTS ... 346

——— **by Crown:** *See* FISHERY ... 489

Grounds of Admission to Bail: *See* BAIL 25

Guardian—*Minor—Hindu Widow—Guardians and Wards Act (VIII of 1890) s. 7, sub-s. (3)—Appointment of guardian to a minor widow—Will—Whether before probate taken out, will may be considered in connection with appointment of guardian to a minor.* In an application for the appointment

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of a guardian of a minor, the Court is bound to consider a will, although probate has not been granted. The fact that there is a contest as to the validity of the will may induce the Court to exercise its discretion one way or the other, but it is not open to the Court to say it will refuse to take notice of the will. *Sayad Shahu* v. *Hapija Begam*, I. L. R. 17 Bom. 560, *Chinnasami* v. *Hariharabadra*, I. L. R. 16 Mad. 380, and *Pathan Ali Khan Badlukhan* v. *Bai Panibai*, I. L. R. 19 Bom. 832, referred to. SARALA SUNDARI DEBI *v.* HAZARI DASI DEBI (1915) I. L. R. 42 Calc. ... 953

——— **for Marriage:** *See* MAHOMEDAN LAW—MARRIAGE ... 351

Guardians and Wards Act (VIII of 1890), ss. 4 (*2*), 24, 25, 26, 41, 47: *See* MAHOMEDAN LAW—MARRIAGE 351

——— **(VIII of 1890), s 7 (*3*):** *See* GUARDIAN ... 953

Handwriting, comparison of, by Court: *See* CHARGE 957

Heir, claim of: *See* OCCUPANCY HOLDING 254

Hereditary Office—*See* LIMITATION ... 244

Heritable Estate: *See* JAIGIR ... 305

High Court, interference by: *See* ACQUITTAL 612

———, **power of:** *See* EXTRADITION WARRANT 793

——— ——— **:** *See* REMAND 888

Hindu Joint-family: *See* MINOR ... 225

Hindu Law—*Alienation by widow—Mortgages executed with alleged consent of reversioners—Nature of proof required of consent which must be established by positive evidence—Absence of proof of legal necessity—Presumption afforded by consent of reversioner.* In this appeal which arose out of suits to recover property mortgaged by a Hindu widow it was *held* (affirming the decisions of the Courts in

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India), that the part taken by the reversioners with respect to the mortgages in question did not, under the circumstances, amount to a consent to bind their interests. When a "stringent equity" arising out of an alleged consent by reversioners is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests; and that such consent should not be inferred from ambiguous acts, or be supported by dubious oral testimony such as appeared to have been relied upon in this case. *Jiwan Singh* v. *Misri Lal*, I. L. R 18 All. 146; L. R. 23 I. A. I, per Lord Hobhouse, referred to. HARI KISHEN BHAGAT *v.* KASHI PERSHAD SINGH 1914) I. L. R. 42 Calc. 876

———*Custom—Babuana and Sohag grants—Proof of Custom—Custom excluding females from succession in Darbhanga-Raj family estate—Custom of exclusion not only from succession to Raj, but extending to succession in collateral branches of family—Custom effective notwithstanding partition had taken place in family branch.* In a suit by one of two brothers in a junior branch of the family of the Darbhanga Raj (an estate governed by the rule of male lineal primogeniture) against the widow of the other brother for possession of her deceased husband's property on the ground that widows were by the custom of the family wholly excluded from succession, not only to the Raj itself, but also in the collateral branches of the family:—*Held*, that there was, on the evidence, a valid custom established in the junior branch of the family to which the parties belonged that widows did not inherit *babuana* properties and that the succession in the case of *sohag* grants was governed by the same custom as governed the succession in the case of *babuana* grants. The custom applied in this case notwithstanding a separation and partition of the property which had been effected between the plaintiff and his brother; and consequently on his brother's death the plaintiff became entitled to such of the estate of his deceased brother as consisted of *babuana* and *sohag* properties, together with accretions which had been made to the former property. *Held*, also, that the custom was strongly supported by instances in the family of widows, who would otherwise have been entitled to a Hindu widow's interest having been excluded from, or not having claimed, possession of property on the death of the husbands; and that the custom being proved to be well established could not, under the circumstances, be defeated by the fact that in one instance, as the evidence showed, it was not enforced. Words used in the *babuana* and *sohag* grants, "*auras putrapoutradi*," were held not be words of general inheritance which would include female as well as male heirs, but words of limitation consistent with the custom which excluded females from succession under *babuana* and *sohag* grants which could not be made under the ordinary Hindu (in this case the Mithila) law. *Ram Lall Mookerjee* v. *Secretary of State for India*, I. L. R. 7 Calc 304; L. R. 8 I. A. 46. EKRADESHWAR SINGH *v.* JANESHWARI BAHUASIN (1914) I. L. R. 42 Calc. 582

———*Inheritance—Right of bandhus to inherit—Bhinnahotra sapindas—Paternal grandfather's son's son's daughter's sons—Limitation of sapinda relationship—Same limitation, namely, 7 degrees on father's side and 5 degrees on mother's side in respect of marriage, affinity, impurity and exequial rites*

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and in cases of inheritance—Mitakshara, Ch II ss. 5 and 6. The Hindu Law contains its own principles of exposition, and questions arising under it cannot be determined on abstract reasoning, or on analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own lawgivers and recognised expounders. The word "*bandhu*" has in the system of the Mitakshara a distinctive and technical meaning, in other words it signifies a *bhinnagotra sapinda*. The appellants as being the paternal grandfather's son's son's daughter's daughter's sons of a deceased Hindu, claimed to succeed to his property as his next-of-kin or *bandhus* under the Mitakshara Law. The respondents contended that the appellants had no heritable right in the property as they did not come within the category of *bandhus* entitled to succeed. *Held*, (*a*) that the *sapinda* relationship on which the heritable right of collaterals is founded ceases in the case of the *bhinnagotra sapinda* with the fifth degree from the common ancestor; and (*b*) that in order to entitle a man to succeed to the inheritance of another, he must be so related to the latter that they are *sapindas* of each other. The appellants, therefore, being sixth in descent from the common ancestor, and there being no *sapinda* relationship between them and the propositus, they came within neither (*a*) nor (*b*) and were not entitled to inherit. The decision in the case of *Greedharee Lal Roy* v. *Government of Bengal*, 12 Moo. I. A. 448, does not warrant the contention that the three classes of *bandhus*, namely, *atmabandhus*, *pitri-bandhus* and *matribandhus* into which Vijnaneswara divides the *bandhus* in the Mitakshara, can be added to or extended.

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The limitation of *sapinda* relationship laid down in the Mitakshara (Achara Kanda), *i e*, that it ceases after the 7th ancestor on the father's side and the 5th ancestor on the mother's side, is not confined to prohibition in respect of marriage, impurity, and exequial rites only, but applies also to inheritance. *Lallubhai* v. *Mankuvarbai*, I. L. R. 2 Bom 388, per Westropp C. J., *Umaid Bahadur* v. *Udoi Chand*, I. L. R. 6 Calc. 119, and *Babu Lal* v. *Nanku Ram*, I. L. R. 226 Calc. 339 referred to. The value of the statement by Sastri Golap Chandra Sarkar in his work on Hindu law that "the word '*bandhu*' in the Mitakshara means and includes all cognate relations without any restriction, or at any rate all cognates within 7 degrees on both the father's as well as the mother's side," is considerably discounted by his desire, in order to prevent the deceased's property becoming, so to speak, derelict, and thus escheating to the Crown, to bring in the caste people also as *bandhus*; and his employing the English equivalent of relation does not seem to be supported by the definition of *sapinda* relationship in the Mitakshara itself. The argument that the application of the *sapinda* relation in the case of *bandhus* should be extended beyond the 5th degree on the ground that it is not likely that Vijnaneswara would give a right of inheritance to a spiritual preceptor or *guru* before kinsmen, however remotely connected, ignores the peculiar and intimate relationship which exists in the Hindu system between the pupil and the *guru* who has to initiate him into the mysteries of the Vedic laws and rites, and under whose roof he has to pass so many years of his life, in which circumstances the mystical relationship between a spiritual preceptor and his pupil might well be regarded

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as creating a far closer tie than remote relationship of blood. RAMCHANDRA MARTAND WAIKAR *v.* VINAYEK VENKATESH KOTHEKAR, (1914) I. L. R. 42 Calc. ... 384

———*Succession to Impartible Estate governed by rule of primogeniture where no custom excluding females existed—Widow of holder who died without male issue—Evidence of separation in joint family—Junior members leaving family-house and living in separate residence after obtaining grant for maintenance.* The succession, on the death of a holder without male issue, to an impartible estate which descended by the rule of primogeniture, the junior members of the family being entitled to grant for maintenance, and where no custom excluding females existed, depended on, whether there had been a separation between two brothers, the father and predecessor in title of the deceased holder and the father of the next contingent reversioner. On that question the Courts in India differed, the Subordinate Judge finding that a separation had taken place, and the High Court being of opinion that what had occurred did not, in intention and fact, amount to a complete separation. *Held* (reversing the decision of the High Court), that the evidence clearly proved that there had been a complete separation, and that the widow of the last holder was, therefore, entitled to succeed to the estate for a Hindu widow's interest in priority to the next male reversioner. TARA KUMARI *v.* CHATURBHUJ NARAYAN SINGH (1915) I. L. R. 42 Calc. ... 1179

———*Mortgage—Mitakshara—Mortgage by father to secure personal debt—Neither antecedent, nor for family purposes, nor immoral—Suit brought after his death—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 120, 132.—Transfer of Property Act (IV of 1882), s. 85, Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1.* The Full Bench decision in the case of *Luchmun Dass* v. *Giridhur Chowdhry* I. L. R. 5 Calc. 855 is still binding on this Court, as no contrary rule has yet been laid down by the Judicial Committee of the Privy Council [either in *Nanomi Babuasin* v. *Modhun Mohun*, I. L. R. 13 Calc. 21; L. R. 13 I. A. 1, or *Bhagbut Pershad* v. *Girja Koer*, I. L. R. 15 Calc. 717; L. R. 15 I. A. 99] nor has it been superseded by subsequent legislation as s. 85 of the Transfer of Property Act (now replaced by O. XXXIV, r. 1 of the Civil Procedure Code, 1908) cannot touch the question. Where a suit upon a mortgage effected by a father governed by the Mitakshara Law for a debt, which is neither antecedent nor for family purposes and not proved to be immoral, had been brought (more than six years) after the death of the father against the sons, some of whom were adult and some minors at the time of the mortgage:—*Held* (without deciding when the right to sue accrues), that Art. 132 of the Schedule to the Indian Limitation Act had no application as there was no charge on immovable property enforceable against the sons: consequently, Art. 120 governed the case. *Luchmun Dass* v. *Giridhur Chowdhry*, I. L. R. 5 Calc. 855, affirmed. *Kishun Pershad Chowdhury* v. *Tipan Pershad Singh*, I. L. R. 34 Calc. 735, approved. *Maheswar Dutt Tiwari* v. *Kishun Singh*, I. L. R. 34 Calc. 184, *Biswanath Pershad Mahata* v. *Jagdip Narain Singh*, I. L. R. 40 Calc. 342; 17 C. W. N. 1025, *Sheo Narain Ray* v. *Mokshoda Das Mittra*, 17 C. W. N. 1022, overruled. BRIJNANDAN SINGH *v.* BIDYA PRASAD SINGH (1915), I. L. R. 42 Calc. 1068

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———*Religious endowments—Shebait—Nature of debutter grants, where grantee is to enjoy properties from generation to generation on performance of sheba of the goddess—Permanent leases by grantee, validity of—Civil Procedure Code (Act V of 1908), s. 99—Ambiguity—Evidence.* In the construction of ancient grants and deeds, evidence is admissible as to the manner in which the thing granted has always been possessed and used, for so the parties thereto must be supposed to have intended. *Weld* v. *Hornby*, 7 East 197 ; 8 R. R. 608, *Fex* v. *Osbourne*, 4 East 32, followed. The Court may call in aid acts under the deed as a clue to the intention. *Doe* v. *Ries*, 8 Bing. 981, followed. This principle does not apply unless there is an ambiguity. *Attorney-General* v. *The Corporation of Rochester*, 5 DeG. M. & G. 882, followed. Consequently, while in a case of ambiguity the Court will uphold that construction of a deed which justifies a long usage as to the application of trust funds, the Court will not, where there is no ambiguity, accept an erroneous interpretation though consistent with usage, so as to sanction a manifest breach of trust. *Drummond* v. *Attorney-General*, 2 H. L. C. 837, followed. If there is a deed which says, according to its true construction, one thing you cannot say that the deed means something else, merely because the parties have gone on for a long time so understanding it. *Sadlier* v. *Biggs*, 4 H. L. C. 435, followed. Where two ancient *debutter* grants by one of the Maharajas of Pachete were held to be ambiguous, the properties having been given to the grantee *who was to enjoy them from generation to generation* on performance of the *sheba* of the goddess, and in 1829 the successors of the grantee gave two permanent leases to the predecessors in interest of the plaintiffs : *Held*, that in those circumstances the Court might determine the true character of the endowment from the manner in which the dedicated properties had been held and enjoyed. That the properties in dispute were not absolute *debutter* properties of the goddess, but were the personal properties of the grantees subject to the charge of the worship of the goddess. *Ganga* v. *Brindaban*, 3 W. R. 142, *Madan* v. *Kamal*, 8 W. R. 42, referred to. That the permanent leases had become indefeasible by lapse of time. *Jagamba Goswamini* v. *Ram Chandra Goswami*, I. L. R. 31 Calc. 314, *Damodar Das* v. *Lakhan Das*, I. L. R. 37 Calc. 885 ; L. R 37 I. A. 147, as explained in the case of *Madhu Sudan Mandal* v. *Radhika Prosad Das*, 16 C. L. J. 349. followed. KULADA PROSAD DEGHORIA v. KALI DAS NAIK (1914) I. L. R. 42 Calc. 536

———*Will—Construction of will—Devise to widow—Gift-over—Life interest—Absolute gift—Power of appointment—Alienation by gift or sale—Administration suit—Cause of action.* A Hindu testator by his will provided for the performance of certain religious ceremonies and devised all his moveable and immoveable properties to his wife with power to alienate by gift or sale. He also by the same will made a gift-over to his daughter in the following terms : —"My daughter, Hara Kumari, shall become entitled to and possessor of whatever property will remain after your death and she shall enjoy the same keeping up and maintaining the aforesaid *sheba*, etc." The will then went on to say :—"the said daughter shall have the same rights as you have and he to whom my said daughter may willingly give away those properties shall while possessing the same and keeping up and maintain-

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ing the *sheba* enjoy them." At his death on the 11th March, 1866, the testator left him surviving his widow and an only daughter, Hara Kumari. The widow, having obtained probate of the testator's will, executed on the 19th May. 1898, in favour of her two grand-daughters, Hemangini and Nagendrabala, born some time after the testator's death, a deed of gift of certain properties acquired by her under the said will. On the 30th September, 1898, the widow died. In October, 1899, Mahim Chandra Sarkar, the testator's nephew, dispossessed Hemangini and Nagendrabala of these properties and took possession of the same. On the 8th March, 1908, Hara Kumari, in whose favour the High Ceurt had decided a suit brought by Mahim Chandra Sarkar for the construction of the testator's will and for a declaration of the rights of the parties thereunder (11 C. W. N. 412 ; 7 C. L. J. 540), executed a deed of gift in favour of her daughter Hemangini and, on the 8th April, 1908, she also executed a similar deed in favour of her other daughter, Nagendrabala, and a *kobala* in favour of Hemangini. In suits brought for administration by Mahim Chandra Sarkar against Hara Kumari, who died during its pendency, for recovery of arrears of rent and cesses in respect of a certain *darpatni* belonging to the estate of the testator, by Mahim Chandra Sarkar against the *darpatnidar* and Hemangini and Nagendrabala and for recovery of possession of certain property acquired by virtue of the deed of gift from the testator's widow, by Hemangini and Nagendrabala against Mahim Chandra Sarkar. *Held*, that Mahim Chandra Sarkar had no cause of action and could not maintain the suit for administration. *Held*, also, that the testator could make an absolute gift to his daughter who

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was his reversionary heir in absolute estate and that the gift to her under her father's will was an absolute gift. *Held*, also, that there was no power of appointment to the daughter enjoining her to nominate an heir or successor to her father's estate. *Held*, also, that the provision for keeping up the *sheba* was merely a collateral charge on the property in whosoever's hands it might be and did not affect on the absolute character of the gift. *Brij Lal* v. *Suraj Bikram Singh*, I. L. R. 34 All. 405, distinguished. *Moulvie Mahomed Shumsool Hooda* v. *Shewukram*, L. R. 2 I. A. 7, *Radha Prasad Mullick* v. *Raneemoni Dassi*, I. L. R. 35 Calc. 896 ; L. R. 35 I. A. 118, *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore*, 9 B. L. R. 377, *Mussamat Kollany Kooer* v. *Luchmee Pershad*, 24 W. R. 395, *Thakur Singh* v. *Nokhe Singh*, I L. R. 23 All. 309, and *Ramasami* v. *Papayya*, I. L. R. 16 Mad. 466, referred to. *Held*, also, that the *patni* was vested in Hemangini and Nagendrabala by alienation during Hara Kumari's life that they were Hara Kumari's heirs, the property being *stridhan*, and that Mahim Chandra Sarkar had no title whatever to any of the properties left by Hara Kumari. *Held*, also, that the widow had absolute power of alienation in derogation of the rights of the sole reversioner, her daughter, who was only entitled to the residue, that the gift by the widow to Hemangini and Nagendrabala was valid, and that Mahim Chandra Sarkar could not plead his right as reversioner against a suit by the heirs of Hara Kumari to eject him as a trespasser, even though the gift should fail. *Hara Kumari Dasi* v. *Mahim Chandra Sarkar*, 12 C. W. N. 412 ; 7 C. L. J. 540, referred to. *Held*, further, that the power of alienation, which though perhaps analogous to what

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was known as a power of appointment in English law, could not be governed by the rules of English law relating to such appointments. *Bai Mativahu* v. *Bai Mamubai*, I. L. R. 21 Bom. 709, referred to. MAHIM CHANDRA SARKAR *v.* HARA KUMARI DASSEE (1914) I. L. R. 42 Calc. 561

Hindu Widow : *See* GUARDIAN ... 953

Homestead Land—*Suit for rent—Jurisdiction—Protected under-tenure—Revenue Sale Act (XI of 1859) s. 37 cl. (4)—Garden—Incumbrances, anulment of, on sale of taluk for arrears of revenue—Provincial Small Cause Courts Act (IX of 1887) Sch. II, Art. 8—Second appeal—Civil Procedure Code (Act V of 1908) s. 102.* Section 102 of the Civil Procedure Code is no bar to second appeals in suits for rent other than house rent although the value thereof does not exceed Rs. 500 ; *vide* Art. 8 of Schedule II of the Provincial Small Cause Courts Act. *Soundaram Ayyar* v. *Sennia Naickan*, I. L. R. 23 Mad. 547, distinguished. When land ceased to be garden-land about a quarter of a century ago, and tenants have been settled on the land since then, the tenure is not protected and does not fall within the 4th exception to section 37 of the Revenue Sale Act (XI of 1859) and is liable to be annulled. The effect of a sale is not *ipso facto* to avoid under-tenures ; the purchaser has the option of avoiding them or keeping them intact. *Titu Bibi* v. *Mohesh Chandra Bagchi*, I. L. R. 9 Calc. 683, followed. It is necessary, therefore, that the purchaser must by some unequivocal act indicate his intention to avoid under-tenures if he desires to do so and the election of the purchaser to avoid must be brought to the knowledge of the under-tenure-holder. A formal written notice is not essential, *Dursan Singh* v. *Bhawani Koer*, 17 C. W. N. 984, followed and explained. The facts, that the purchaser demanded rents from the tenants to the knowledge of the under-tenure-holder, sued the tenants for *rent*, took out warrants of attachment in execution of decrees and realized rents from the tenants in repudiation of the under-tenure-holder's title, go to show that the under-tenure-holder had not only notice of unequivocal acts on the part of the purchaser indicating his election to avoid the *mokarrari*, but the purchaser had in fact obtained possession of the estate. *Mir Waziruddin* v. *Deoki Nandan*, 6 C. L. J. 472, distinguished. *Per* N. R. CHATTERJEA J. The mere fact that a garden was made on a piece of land a quarter of a century before the sale, would not make it land on which a garden has been made for all time to come. *Per* BEACHCROFT, J. No particular method of expressing an intention to annul an under-tenure is necessary. There must be established (i) a definite intention to annual ; (ii) an indication of that intention to the under-tenure-holder. To afford protection the work must *still be in existence* or the land be used for the purpose of the work The perfect tense in " leases of land whereon . . . gardens *have* been made " denotes a present state. *Obiter* : If the *busti* land is covered by the lease of the land on which the mill stands, or if the *busti* is an integral part of the mill, and exists only for the purposes of the mill, it is possible that it might be protected SAHADORA MUDIALI *v.* NABIN CHAND BORAL (1914) I. L. R. 42 Calc. 638

Identity of Transaction : *See* MISJOINDER OF CHARGES 1153

Ijmali Share : *See* SALE FOR ARREARS OF REVENUE 897

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Impartible Estate: *See* HINDU LAW—INHERITANCE 1179

Inadqeuacy of Price: *See* SALE FOR ARREARS OF REVENUE ... 897

Income Tax—*Executor's liability to income tax—Suit, maintainability of, for declaration of non-liability to tax—Collector, jurisdiction of, to assess income tax—Income Tax Act (II of 1886)—Contract Act (IX of 1872) s. 72.* Income accruing to an executor under the will of a testator is 'income' as defined in s. 3, clause (5) of the Income Tax Act, 1886, and is liable to be taxed under the Act. It is the Collector's duty to determine what persons are chargeable in respect of sources of income other than salaries and pensions, profits of companies and interest on securities. A suit brought by an executor of an estate for a declaration that as executor he was not liable to pay income tax in respect of any income of the estate and that the collector, in realising the sums paid to him, acted without jurisdiction, and for a decree for the amount so paid with interest, does not lie. Payment of income tax by the executor of an estate, under protest, on the ground that as executor no tax was payable by him, may be regarded as paid under coercion within the meaning of s. 72 of the Contract Act. *Kanhaya Lal* v. *National Bank of India, Ld.*, I. L. R. 40 Calc. 598; L. R. 40 I. A. 56, referred to. FORBES v. SECRETARY OF STATE FOR INDIA (1914), I. L. R. 42 Calc. 151

Income Tax Act (II of 1886): *See* INCOME TAX 151

Incumbrance: *See* HOMESTEAD LAND ... 638

Indian Marine Service: *See* SERVICE OF SUMMONS 67

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Inherent Power of High Court: *See* APPEAL 433

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Inheritance: *See* HINDU LAW ... 384

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——— *See* OCCUPANCY HOLDING 254

Injunction—*Limitation—Suit for damages for obtaining perpetual injunction maliciously and without reasonable cause—Limitation Act (IX of 1908), Sch. I, Art. 42.* No suit lies for damages against a defendant for, maliciously and without reasonable or probable cause, obtaining a perpetual injunction which was subsequently dissolved on appeal. *Nand Coomar Shaha* v. *Gour Sunkar*, 13 W. R. 305, doubted. *Quartz Hill Mining Co.* v. *Eyre*, 11 Q. B. D. 690, *Smith* v. *Day*, 21 Ch. D. 421, *Hari Nath Chatterjee* v. *Mothur Mohun Goswami*, I. L. R. 21 Calc. 8; L. R. 20 I. A. 188, *Chander Cant Mookerjee* v. *Ram Coomar Coondoo*, 22 W. R. 138, *Cotterell* v. *Jones*, 11 C. B. 713, *Turner* v. *Ambler*, 10 Q. B. 252, referred to. Under Art. 42, Sch. I of the Limitation Act (IX of 1908) time begins to run from the date when the injunction ceases. MOHINI MOHAN MISSER *v.* SURENDRA NARAYAN SINGH (1914) I. L. R. 42 Calc. 550

Insolvency: *See* MINOR 225

———*Attachment under mortgage decree and order for sale of mortgaged property—Vesting order under s. 7 of Insolvency Act (11 & 12 Vict., c. 21), effect of—Sale after vesting order—Sale by Official Assignee to plaintiff—Title of purchaser from Official Assignee as against judgment-creditor purchasing at sale in execution of his own decree—Notice.* An attachment in execution of a money-decree on a mortgage of land, followed by an order for sale of the interest of the judgment-debtor does not create any charge on the land, *Sarkies* v. *Bundoo Baee*, 1 N. W. P. 172, referred to. An attachment prevents and avoids any private alienation, but does not

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invalidate an alienation by operation of law such as is effected by a vesting order under the Indian Insolvency Act (11 & 12 Vict. c. 21); and an order for sale though it finds the parties does not confer title. Previous to the 8th September 1904 a colliery leased to the judgment-debtors was attached under a mortgage decree by the respondents (judgment-creditors) and an order for sale on 5th September was made, but at the request of the judgment-debtors the sale was postponed until the 10th. On 8th September the judgment-debtors filed their petition in the Insolvency Court in Calcutta and the usual vesting order was made on the same day. On 12th September the execution proceedings were stayed. After issue of notice, on the application of the respondents, to the Official Assignee to show cause why he should not be substituted in the place of the judgment-debtors, the Subordinate Judge on 10th January 1905, finding that the notice had been duly served, made the order for substitution and fixed the sale for 6th March 1905, on which day the property was sold and purchased by the respondents who in June were put into possession. Meanwhile on 23rd May 1905 the Official Assignee with leave from the Insolvency Court in March 1908 sold the property to a purchaser, who on 24th June 1908 sold it to the plaintiffs by whom on 16th July 1908 the present suit was brought for possession of the colliery. *Held* (reversing the decision of the High Court), that the notice calling on the Official Assignee to show cause why he should not be substituted for the judgment-debtors was not a proper notice under section 248 of the Civil Procedure Code, 1882. A notice under that section should have called on him to show cause why the decree should not be executed against him. But assuming the notice to have been duly served (which was denied) the sale was altogether irregular and inoperative. The property having vested in the Official Assignee it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land, and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place, no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which had been done. In the third place, the judgment-debtors had, at the time of the sale, no right, title or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property. *Malkarjun* v. *Narhari*, I. L. R. 25 Bom. 337; L. R. 27 I. A. 216, distinguished. No proper notice was served under section 248 of the Civil Procedure Code, and the respondents had full notice, and were responsible for the irregularities of the procedure adopted. RAGHUNATH DAS *v.* SUNDAR DAS KHETRI (1914) I. L. R. 42 Calc. ... 72

———*Interim Receiver—Insolvent's money, attachment of, before the adjudication order—Provincial Insolvency Act (III of 1907), s. 13, cl. (2), s. 16, cl. (6), s. 34, cl. (1)—Bankruptcy Act of 1883 (46 & 47 Vict. c. 52), s. 40.* An *interim* receiver is appointed for the protection of the estate of the debtor for the benefit of the entire body of creditors. *Ex parte Fox*, L. R. 17 Q. B. D. 4, referred to. Clause (*1*) of s. 34 of the Provincial Insolvency Act restricts the operation of s. 16 clause (*6*) thereof. A creditor, who had attached a sum of money due to the insolvent before his estate vested in the receiver appointed after the adjudication

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order, is entitled to apply it exclusively in satisfaction of his debt. MADHU SARDAR v. KHITISH CHANDRA BANERJEE (1914) I. L. R. 42 Calc. 289

———*Practie—Presidency Towns Insolvency Act (III of 1909), s. 36, (4), (5), whether applicable to contentious matters.* Section 36 (*4*) and (*5*) of the Presidency Towns Insolvency Act, 1909, is intended to provide a summary procedure for ordering payment of debts due and delivery of property belonging to an insolvent, where there is no dispute : it is not intended for contentious matters or for following property the subject of fraudulent preference or dishonest concealment. *In re* J. M. LUCAS AND ANOTHER (1914), I. L. R. 12 Calc. 109

Insolvency Act (11 & 12 Vict. c. 21) s. 7 *See* INSOLVENCY 72

Insolvency of Partner : *See* MINOR ... 225

Intangible Property : *See* PALAS OR TURNS OF WORSHIP ... 455

Interest : *See* MORTGAGE ... 114

Interest : *See* SLAVERY BOND ... 742

———*Contract Act (IX of 1872), ss. 16, 74—Undue influence, presumption of—Penalty—Excessive and usurious interest—Duty of the Court.* Where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate. The attempt to conceal the real rate of interest, by describing it as one pice in the rupee per mensem or, as in the present case, Rs. 5 per mensem is evidence of an intention to get the better of the debtor. The law lays down that there must be a footing of complete equality between debtor and creditor and they must be, so to speak, at arm's length to make a bargain, which is in itself harsh and unconscionable, enforcible at law. *Carringtons, Ld.*

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v. *Smith*, [1906] I K. B. 79, *In re a Debtor*, [1903] 1 K. B. 705, referred to. Where there is ample security, an excessive rate of interest has been held to be anything over ten per cent. Where there is no security, no rate of interest can be considered excessive. There can be no standard rate on personal loans, and where the parties are reasonably on terms of equality, a Judge cannot do better than adopt what they themselves have agreed on though, of course, when that is not the case he has to judge what is reasonable, as best he can and under all the circumstances. Where the contract is for a temporary accommodation, the stipulation that interest is to run at Rs. 5 a month is one which necessitates the payment of interest not at 60 per cent. per annum, but at Rs. 5 in each month and a stipulation that in defeult of 12 months' instalments of interest, compound interest would begin to run, is in the nature of a penalty. However technical this may be, it is the duty of the Courts in India to enforce the letter of the law against obviously harsh and unconscionable bargains of this nature. The exploitation of the necessitous, of the careless and inexperienced, is a trade to be extirpated in the interest of the whole community as contrary to individual morality, as well as to public policy. *Muthu Krishna Iyer* v. *Sankaralingam Pillai*, I. L. R. 36 Mad. 229, *Samuel* v. *Newbold*, [1906] A. C 461, *Kesavulu Naidu* v. *Arithulai Ammal*, I. L. R. 36 Mad. 533, referred to. ABDUL MAJEED v. KHIRODE CHANDRA PAL. (1914) I. L. R. 42 Calc. 690

Interest—*Stipulation in mortgage bond or interest at 75 per cent. per annum whether penalty—Liquidated damages—Undue Influence—Unconcionable bargain—Contract Act (IX of 1872), ss. 16, 74, illus. (f) as amended by Act VI of 1899, s. 4*

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(1)—*Act XXVIII of 1855, s. 2. Per* Mookerjee J. (Beachcroft, J. agreeing to as to penalty). Notwithstanding the small group of cases where a restricted view was taken of the authority of the Court to relieve against a penalty, the tide has turned back, and the more modern cases repudiate the doctrine that any rate of interest, however exorbitant, cannot be deemed penal. *Motoji* v. *Sheikh Husain*, 6 Bom. H. C. 8, *Pava* v. *Govind*, 10 Bom. H. C. 382, followed. *Arjan Bibi* v. *Asgar Ali*, I. L. R. 13 Calc. 200, *Gokul Chand* v. *Khaja Ali*, (1890) Punj. Rec. 32, *Sankaranarayana Vadhyar* v. *Sankaranarayana Ayyar*, I. L. R. 25 Mad. 343, *Chinna* v. *Pedda*, I. L. R. 26 Mad. 445, *Periaswami* v. *Subramanian*, 14 Mad. L. J. 146, not followed. This principle is fairly deducible from the modern decisions that the Court is competent to grant relief whenever the rate of interest appears to the Court to be penal. *Miajan Patari* v. *Abdul Jubbar*, 10 C. W. N. 1020, *Velchand* v. *Flagg*, I. L. R. 36 Bom. 164 : 14 Bom. L. R. 18, *Ganapathi* v. *Sundara*, 22 Mad. L. J. 354, *Muthukrishna* v. *Sankaralingam*, I. L. R. 36 Mad. 229, followed. Although s. 74 of the Contract Act was originally framed to deal with the doctrine of penalty and liquidated damages as understood in the law of England, it is in its present form comprehensive enough to include the type of cases before the Court, because it covers all cases where the contract contains "*any stipulation by way of penalty.*" It is obvious that each case must be treated on its own circumstances. The test is, was the agreement to pay damages for the breach of contract unconscionable and extravagant, such as no Court ought to allow to be entered into. *Webster* v. *Bosanquet*, [1912] A. C. 394, referred to. "You are to consider whether

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it is extravagant, exorbitant, or unconscionable *at the time when* the stipulation is made—that is to say, in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract." *Clydebank Engineering Co.* v. *Don Jose Castaneda*, [1905] A. C. 6, referred to. A stipulation for merely accelerating payment of the whole debt in default of payment of one or more instalments is not, by itself, by way of penalty. *Ex parte Burden*, 16 Ch. D. 675, *Sterne* v. *Beck*, 1 DeG. J. & S. 595 *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, referred to. But when the entire sum which the creditor had agreed to receive in instalments without interest, is not only repayable in one sum, but is also made to carry interest at an unusual rate, the Court may, in view of all the circumstances of the case, regard the stipulation for payment of interest at an exorbitant rate as penalty. When (on an account originally made up very largely of interest at an exorbitant rate) the stipulation was made in the mortgage bond (no interest being payable up to due date) that upon default of payment of one or two instalments not only would the whole balance due become forthwith payable, but would carry interest at the rate of 75 per cent. per annum : *Held*, that the covenant for payment of interest at this rate was a *penally*, *i. e.*, it did not represent the damages which the creditors were likely to suffer by reason of the default of the debtors, but was rather intended as an effective means to secure punctual performance of the contract. *Per* Mookerjee J. Where the facts make it clear that the creditors were in a position to take advantage of the embarrassment of their debtors and the bargain they made

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was unconscionable, there is a concurrence of the two elements which must combine to attract the operation of s. 16 of the Contract Act *Davis* v. *Maung Shwe Goh*, I. L. R. 38 Calc. 805 ; L. R. 38 I. A. 155, *Kesavulu Naidu* v. *Arithulai Ammal*, I. L. R. 36 Mad. 533, followed. KHAGARAM DAS *v.* RAMSANKAR DAS PRAMANIK (1914), I. L. R. 42 CALC. 652

Interim Receiver: *See* INSOLVENCY ... 289

Interlocutory Order: *See* JURISDICTION 926

Irregularity: *See* SALE FOR ARREARS OF REVENUE 765

Jaigir: *Sanad, construction of—Tenure created by document—Custom—Life estate—Use of the words 'putra poutradi'—Absolute and heritable estate—Regulation XXXVII of 1793, s. 15.* A grant of a *jaigir* is a grant for life only, but in the absence of any custom to the contrary, the addition of the words "*putra poutradi*" in the grant implies an absolute and heritable estate and passes an estate of inheritance. Under a *sanad patta* the ancestor of the plaintiff granted a *jaigir* in the district of Hazaribagh to the grantee and his *putra poutradi*. On the death of the grantee and of his sons without any male issue, the plaintiff finding that the tenants of the *jaigir* stopped paying him the rents, brought a suit for resumption of the *jaigir* on the ground that according to custom the grant was a service grant resumable by the grantor and his representatives on failure of male issue in the line of the grantee, and obtained a decree. On appeal to the High Court :— *Held*, that the original grantee took an absolute, heritable, and alienable estate and that all his heirs were capable of inheriting it. *Ramlal Mookerjee* v. *The Secretary of State for India*, I. L. R. 7 Calc. 304 ; L. R. 8 I. A. 46, followed. *Gulabdas Jugjivandas* v. *The Collector of Surat*, I. L. R. 3 Bom. 186 ; L. R. 6 I. A. 54, *Bhujanga Rau* v. *Ramayamma*, I. L. R. 7 Mad. 387, and *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*, I. L. R. 24 Calc. 834 ; L. R. 24 I. A 76, referred to. *Perkash Lal* v. *Rameshwar Nath Singh*, I. L. R. 31 Calc. 561, and *Roopnath Konwur* v. *Juggunnath Sahee Deo*, 6 S. D. A. Sel. Rep 158, distinguished. RAM SARAN LALL *v.* RAM NARAYAN SINGH (1914) I. L. R. 42 Calc. 305

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Jalkar, right of: *See* FISHERY ... 489

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——————: *See* HOMESTEAD LAND ... 638

——————: *See* SANCTION FOR PROSECUTION 667

——————: *Proceedings under s. 10, Civil Procedure Code—High Court's Jurisdiction to interfere with interlocutory orders—Civil Procedure Code (Act V of 1908), s. 10.—Charter Act (24 & 25 Vict, c. 105), s. 15.* The jurisdiction of a Court in a proceeding under s. 10 of the Code of Civil Procedure is limited to stopping a new suit if the circumstances mentioned in that section as conditions precedent to the passing of the order be found by the Court to exist. Courts have no jurisdiction to decide the question of *res judicata* in such a proceeding. Where a Court has jurisdiction to pass an order, but it has been exercised in violation of the provisions of the law and under a misapprehension of the questions at issue, the Court must be held to have acted with material irregularity in the exercise of its jurisdiction. *Venkubai* v. *Lakshman Venkoba Khot*, I. L. R. 12 Bom. 617, *Sew Bux Bogla* v. *Shib Chunder Sen*, I. L. R. 13 Calc. 225, *Jugobundhu*

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Puttuck v. *Jadu Ghose*, I. L. R. 15 Calc. 47, *Tarini Charan Banerjee* v. *Chandra Kumar Dey*, 14 C. W. N. 788, referred to. The High Court is entitled to interfere under s. 15 of the Charter Act, if not under s. 115 of the Code, with interlocutory orders, when they might lead to failure of justice or irreparable injury. *Dhapi* v. *Ram Pershad*, 1 L. R. 14 Calc. 768, *Gobinda Mohan Das* v. *Kunja Behari Dass*, 14 C. W. N. 147, and *Amjad Ali* v. *Ali Hussain Johar*, 15 C. W. N. 353, referred to. SIVAPRASAD RAM *v.* TRICOMDAS COVERJI BHOJA (1915) I. L. R. 42 Calc. 926

——— "*Suit for land or other immoveable property*," *construction of—Letters Patent, 1865, cl. 12—Trespass—Compensation for wrong to land—Wrongful cutting and removal of coal—Civil Procedure Code (Act V of 1908), s. 16—Civil Procedure Code (Act VIII of 1859), s. 5—Venue.* The expression "suits for land or other immoveable property" in clause 12 of the Charter of 1865 cannot be construed as being limited to suits for the recovery of land in its strict sense, but must be construed as extending to a suit for compensation for wrong to land, where the substantial question is the right to the land. SUDAMDIH COAL CO., LD. *v.* EMPIRE COAL CO., LD. (1915) I. L. R. 42 Calc. 942

———*Suit to enforce mortgage of land partly in Sonthal Parganas and partly in local jurisdiction of Bhagalpur Court—Jurisdiction of Bhagalpur Court—Sonthal Parganas Settlement Regulation (III of 1872), ss. 5 and 6—Sonthal Parganas Act (XXXVII of 1855), s. 2—Sonthal Parganas Justice Regulation (V of 1893), Part 2 and s. 10—Consent of parties to jurisdiction of a Court—Usury provision relating to, in s. 6 Regulation III of 1872—Question of Jurisdiction not taken in High Court—Scheduled Districts Act (XIV of 1874).* In a suit in the Court of the Subordinate Judge of Bhagalpur, to enforce a mortgage bond for principal and interest amounting to over 5 lakhs of rupees, by far the greater portion of the mortgaged property was situated in the Sonthal Parganas, and the mortgagors resided in that district the rest of the property being situated within the local jurisdiction of the Bhagalpur Court. The mortgage bond was executed at Bhagalpur, and contained a stipulation that the mortgagees might enforce it in the Bhagalpur Court. The suit was instituted on 20th June 1904. On an objection taken that the Bhagalpur Court had no jurisdiction to entertain the suit:—*Held*, on an examination and consideration of the Acts and Regulations applicable to the Sonthal Parganas, that at the date the suit was commenced no suit would lie in any Court established under the Bengal Civil Courts Act (VI of 1871) or under the Bengal, United Provinces, and Assam Civil Courts Act (XII of 1887) which has taken its place, in regard to any land, or any interest in, or arising out of land, but such suits must have been brought before Settlement Officers, or in Courts of Officers appointed under section 2 of the Sonthal Parganas Act (XXXVII of 1855), and the Sonthal Parganas Justice Regulation (V of 1893), Part 2, so long as the land had not been settled, and the settlement declared by a notification in the *Calcutta Gazette* to have been completed and concluded. And, it being found that the land included in the mortgage in suit had not been wholly settled, the suit came within the provisions of s. 5 of the Sonthal Parganas Settlement Regulation (III of 1872), and was excluded from the jurisdiction of any but the special officers or Courts appointed

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under s. 2 of Act XXXVII of 1855, and therefore the Bhagalpur Court not being one of the special Courts had no jurisdiction to try it. The stipulation in the mortgage bond to the effect that the mortgagees might enforce it in the Bhagalpur Court was of no effect. As the suit was one with regard to land in the Sonthal Parganas which the Bhagalpur Court had no jurisdiction to entertain, the parties could not by consent give the necessary jurisdiction to the Court. To allow them to do so would be to nullify the express provisions of s. 5 of Regulation III of 1872, which was binding on any Court having jurisdiction in the Sonthal Parganas in the exercise of such jurisdiction. *Held*, also, that apart from the question of jurisdiction, any Court dealing with the subject-matter of the suit would be bound to give full force and effect to the provisions of s. 6 of Regulation III of 1872, relating to usury, and therefore to refuse to decree any compound interest arising from any intermediate adjustment of interest, or a total amount of interest exceeding the principal of the original debt or loan. This provision of section 6 was not one of procedure, but of substance, and so far as the Court having jurisdiction within the Sonthal Parganas are concerned, it places all contractual stipulations as to compound interest in a position of non-enforceability, and limits statutably the total interest which can be decreed on a loan or debt. The question of jurisdiction which depended on no disputed facts, was in issue in the suit, and had been adjudicated upon in the first Court, was one which their Lordships were of opinion they could not decline to entertain though not specifically raised on the appeal, especially as it necessarily presented itself in argument. *Semble*: The provisions of the

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Scheduled Districts Act (XIV of 1874) have never been extended to the Sonthal Parganas. MAHA PRASAD SINGH v. RAMANI MOHAN SINGH, (1914) I. L. R. 42 Calc. ... 116

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Leading Questions: *See* CHARGE ... 957

Leave to appeal to Privy Council—*Application—Civil Procedure Code (Act V of 1908) s. 110—Computation of time—Limitation Act IX of 1908, s. 12 whether ultra vires—Legislative powers of the Governor-General in Council—Order in Council, 1838—Government of India Act, 1858 (21 & 22 Vict., c. 106), s. 64—Indian Councils Act, 1861 (24 & 25 Vict., c. 67)—Letters Patent, 1865, ss. 39, 44.* Section 12 of the Limitation Act of 1908 applies to applications for leave to appeal to His Majesty in Council. Section 12, sub-cl. (*2*) which enacts that "in computing the period of limitation prescribed for an application for leave to appeal . . . the time repuisite for obtaining a copy of the decree . . . appealed from . . . shall be excluded" was within the legistative powers of the Governor-General in Council, not being in contravention of section 64 of the Government of India Act, 1858, and is not *ultra vires*. *Eastern Mortgage and Agency Company, Limited* v. *Purna Chandra Sarbagna*, I. L. R. 39 Calc. 510, *Lakshmanan* v. *Peryasami*, I. L. R. 10 Mad. 373, *Anderson* v. *Periasami*, I. L. R. 15 Mad. 169, *In re Sita Ram Kesho*, I. L. R. 15 All.

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14, *Thurai Rajah* v. *Jainilabdeen Rowthan*, I. L. R. 18 Mad. 484, *Moroba Ramchandra* v. *Ghanasham Nilkant Nadkarni*, I. L. R. 19 Bom. 301, *Motichand* v. *Ganga Parshad Singh*, I. L. R. 24 All. 174; L. R 29 I. A. 40, referred to. ABDULLAH HOSSEIN CHOWDHURI *v.* ADMINISTRATOR-GENERAL OF BENGAL (1914) I. L. R. 42 Calc. 35

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——**Interest:** *See* HINDU LAW—WILL 561

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Limitation: *See* CHEQUE, PAYMENT BY ... 1043

——*See* HINDU LAW—INHERITANCE 384

——*See* HINDU LAW—MORTGAGE 1068

——*See* INJUNCTION ... 550

——*Limitation Act (IX of 1908), Sch. I, Art. 124—(Act XV of 1877) Sch. II, Art. 124—Hereditary office of shebait—Successor of shebait when bound by decree against predecessor in shebaitship—Decree-holder and purchaser at sale in execution who by reason of low caste is not competent to hold office of shebait—Adverse misappropriation of temple income by trespasser incompetent to be shebait—Wrongful possession not constituting wrongful holder shebait—Res Judicata.* This was an appeal from the decision of the High Court in the case of *Jharula Das* v. *Jalandhar Thakur*,

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Limitation—*contd.*

I. L. R. 39 Calc. 887, in which the widow of the shebait of a temple (the shebaits of which were Brahmin Pandas) who succeeded her deceased husband in that office, mortgaged land together with her interest in the income of the temple to the defendant (who was not a Brahmin). The defendant obtained a decree on his mortgage on 24th September 1880, in execution of which he put up for sale the share of the temple income, purchased it himself, and got delivery of possession in 1892. The widow died in May 1900. In a suit brought on 28th January 1910 for the land and mesne profits, and for a declaration that the plaintiff was entitled to receive the share of the temple income as it was inalienable, the defence was that the suit, so far as it related to the temple income, was barred as being *res judicata*, and by limitation. *Held* by the Judicial Committee (reversing the decision of the High Court), that Art. 124 of the Limitation Act was not applicable. The suit was not one for an hereditary office which could not be held by a person who was not a Brahmin, and the defendant was therefore not competent to hold the office of shebait, and had not taken possession of it. By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings, the defendant acquired no title, and no right to a share of that income. On each occasion on which he received and wrongfully appropriated to his own use a share of the income to which the shebait was entitled, the defendant committed a fresh actionable wrong in respect of which a suit could be brought against him by the shebait; but it did not constitute him the shebait for the time being, or affect in any way the title to the office. *Held*, also, that the defence (which had been upheld by the

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Limitation—*contd.*

High Court) that the suit was barred as *res judicata* by the decision in a former suit brought by the widow to set aside the sale of the temple income was not maintainable. JALANDHAR THAKUR *v.* JHARULA DAS (1914) I. L. R. 42 CALC. 244

———*Mortgage suit—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 3 and 6—Limitation Act (IX of 1908) Sch. I, Art. 181—Transfer of Property Act (IV of 1882) s. 90—Personal covenant.* The plaintiff in a mortgage suit, who has his personal remedy at the date of the institution of the suit, would not lose his personal right by reason of his not having made the application for personal decree under O. XXXIV, r. 6, within three years of the date of the confirmation of the mortgage sale, since applications under O. XXXIV, r. 6, are not governed by Art. 181 of the Limitation Act any more than an application for order absolute under O. XXXIV, r. 3. *Rahmat Karim* v. *Abdul Karim*, I. L. R. 34 Calc. 672, and *Madhabmoni Dasi* v *Pamela Lambert*, 12 C. L. J. 328, referred to. BISWAMBHAR SHAHA *v.* RAM SUNDAR KAIBARTA (1914) I. L. R. 42 Calc. ... 294

———*Preliminary Mortgage-decree—Limitation Act (IX of 1908) Sch. I, Arts. 180, 183—Application for sale of mortgaged property under decree—Transfer of Property Act (IV of 1882) ss. 85 to 89—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 5.* In this case their Lordships of the Judicial Committee affirmed the decision of the High Court in *Amlook Chand Parrack* v. *Sarat Chunder Mukerjee*, I. L. R. 38 Calc. 913, that an application for an order absolute for sale under a mortgage decree is an application "to enforce a judgment or decree" within the meaning of Art. 183 of

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Limitation—*concld.*

Sch. I of the Limitation Act (IX of 1908), and is therefore barred if not made within the period prescribed by that article. MUNNA LAL PARRACK *v.* SARAT CHUNDER MUKERJI (1914) I. L. R. 42 Calc. 776

Limitation Act (XV of 1877) Sch. II, Arts. 120, 132 : *See* HINDU LAW—MORTGAGE 1068

Limitation Act (IX of 1908) s. 5 : *See* APPEAL 433

———**s. 12 :** *See* LEAVE TO APPEAL TO PRIVY COUNCIL 35

———**s. 20 :** *See* CHEQUE, PAYMENT BY ... 1043

———**Sch. I, Arts. 29, 35, 49 :** *See* ARREST OF SHIP ... 85

———**Sch. I, Art. 42 :** *See* INJUNCTION 550

———**Sch. I. Art. 124 :** *See* LIMITATION—SHEBAIT ... 244

———**Arts. 180, 183 :** *See* LIMITATION ... 776

———**Art. 181 :** *See* LIMITATION ... 294

Limited Company : *See* PATNI LEASE ... 1029

Liquidated Damages : *See* INTEREST ... 652

Magistrate, duty of : *See* COMMITMENT 608

Mahomedan Law— *Gift made in lieu of dower—Nature of such gift.* The provisions of the Mahomedan Law applicable to gifts, made by persons labouring under a fatal disease, do not apply to a so-called gift made in lieu of a dower-debt which is really of the nature of a sale. *Ghulam Mustafa* v. *Hurmat*, I. L. R. 2 All. 854, followed. *Abbas Ali* v. *Karim Bakhsh*, 13 C. W. N. 160, and *Bibi Janbi* v. *Hazrath Saib*, 21 Mad. L. J. 958, referred to. ESAHAQ CHOWDHRY *v.* ABEDUNNESSA BIBI (1914) I. L. R. 42 CALC 361

———*Marriage—Minor—Guardian for marriage, functions and position of—Marriage of minor*

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Mahomedan Law—*contd.*

ward, necessity of consent of Court fee—Functions of Court in such cases—Procedure to be followed by the guardian for Marriage of Mahomedan infant—Guardians and Wards Act (VIII of 1890), ss. 4(2) 24, 25, 26, 41, sub-s. (1), cl. (d), 42 sub-s. (1), 47 cl. (a)—Practice—Order of District Judge not appealable. In the case of Mahomedans the words "disposal in marriage" cannot be treated as included in the general words "such other matters as the law to which the ward is subject requires" occurring in s. 24 of the Guardians and Wards Act. In the absence of express statutory provision to this effect, it cannot reasonably be held that the Mahomedan law on the subject of guardianship in marriage has been abrogated by implication by s. 24 of the Guardians and Wards Act. Where the District Judge of Birbhum, in the matter of the disposal in marriage of a Mahomedan female minor in respect of whose person and property guardians had been appointed by him, proceeded to select a suitable husband for the minor from the preliminary list of possible candidates prepared by his Hindu Nazir (the guardian of the property), in opposition to the selection of the guardian of the person (her mother), and of the guardian for marriage (her father's step-brother), both of whom had initiated these proceedings. *Held*, that the proceedings before the District Judge had been throughout irregular. It was not the function of the District Judge to act as match-maker. But a ward of Court could not marry without the consent of the Court. *Eyre* v. *Shaftesbury*, 2 P. Wms. 103, *Jeffrys* v. *Vanteswarstwarth*, Barn. Ch. 141, *Tombes* v. *Elers*, 1 Dick 88, *Subhadra Koer* v. *Dhajadhari Goswami*, 15 C. L. J. 147, followed *Bai Divali* v. *Moti Karson*, I. L. R. 22 Bom. 509, disapproved. *Held*, further, (after laying down the proper procedure to be followed in cases of this description) that the choice had to be made in the first instance by the guardian for marriage, and if on the materials before the District Judge he was satisfied that the marriage was not unsuitable, he was to sanction it. *Held*, also, that the order of the District Judge was not open to appeal, as s. 47, cl. (*a*) of the Guardians and Wards Act read with s. 43 sub-s. (*1*) and ss. 24, 25 and 26 did not cover the case. MONIJAN BIBI *v.* DISTRICT JUDGE, BIRBHUM (1914) I. L. R. 42 CALC. 351

———— *Wakf—Constitution of wakf by deed of trust—Objects charitable and religious—Validity of wakf.* Where with the object of dedicating a house to the service of the Imams, Hassan and Hussain, and for other religious purposes, the settlor had conveyed the house to his grand daughter and his grand son on trust for the proper observance of the objects mentioned in the deed:—*Held*, that there was a valid wakf. *Delross Banoo Begum* v. *Ashgur Ally Khan*, 15 B. L. R. 167, discussed. *Phul Chand* v. *Akbar Yar Khan*, I. L. R. 19 All. 211, *Biba Jan* v *Kalb Hussain*, I. L. R. 31 All 136, *Mazhar Husain Khan* v. *Abdul Hadi Khan*, I. L. R. 33 All. 400, referred to. RAM CHARAN LAW *v.* FATIMA BEGAM (1915) I. L. R. 42 CALC. ... 933

Maritime Necessaries: *See* ARREST OF SHIP 85

Marriage *See* MAHOMEDAN LAW ... 351

Measure of Right: *See* EASEMENT ... 46

Mineral Rights—*Moghali Brahmottar—Grant.* Moghali Brahmottar grant of a mauza does not pass the minerals under it to the grantee. *Hari Narayan Singh Deo* v. *Sriram Chakravarti*, I. L. R. 37 Calc. 723, and *Jyoti Prasad Singh* v. *Lachipur*

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Mineral Rights—*concld.*
Coal Co., I. L. R. 38 Calc. 845, followed. *Sonet Kooer* v. *Himmut Bahadoor*, I. L. R. 1 Calc 391, distinguished. KUNJA BEHARI SEAL *v.* DURGA PRASAD SINGH (1914) I. L. R. 42 Calc. ... 346

Minor: *See* GUARDIAN 953

———*See* MAMOMEDAN LAW—MARRIAGE 351

———*Insolvency—Provincial Insolvency Act (III of 1907), ss. 4, cls. (b), (g), 16—Contract Act (IX of 1872), ss. 11, 247, 253, 254.—Infant, adjudication of, as an insolvent Receiver in Insolvency, powers of—Hindu joint-family—Bankruptcy Act, 1883, (46 & 47 Vict., c. 52), ss. 33, 102—Insolvency of partner—Dissolution of partnership.* In India, as in England, an infant partner of a firm cannot as such be adjudicated an insolvent. *Lovell & Christmas* v. *Gilbert Walter Beauchamp*, [1894] A. C. 607, followed. The creditors of the firm are not entitled to proceed against him personally, being restricted only to his interest in the property of the firm (*vide* s. 247 of the Indian Contract Act). There is no difference in principle between the nature of the liability of an infant admitted by *agreement* in a partnership business and that of another (*e.g.*, a Hindu) on whose behalf an *ancestral* trade is carried on by his guardian. *Joykristo* v. *Nittyanand*, I. L. R. 3 Calc. 738, *Ram Partab* v. *Foolibai*, I. L. R. 20 Bom. 767, referred to. It is not open to the Court to direct the receiver in insolvency to deal with assets other than those belonging to the persons who have been adjudicated insolvents. *Lovell & Christmas* v. *Gilbert Walter Beauchamp*, [1894] A. C. 607, explained. Whereas in England the bankruptcy of a partner works dissolution of the partnership without an order of the Court, it is not so in India. *Vide* ss. 253, 254 of the Indian Contract Act. A receiver appointed under s. 16 of the Provincial Insolvency Act merely replaces the insolvent partner in respect of the business of the firm. The position of a receiver is the same both with regard to a Hindu joint family partnership assets and acquisitions therefrom. SANYASI CHARAN MANDAL *v.* ASUTOSH GHOSE, (1914) I. L. R. 42 Calc. 225

Minor Widow: *See* GUARDIAN ... 953

Misappropriation: *See* SHEBAIT ... 244

Misjoinder—*Wrongful confinement on one day, wrongful confinement and assault of the same persons on a subsequent day—Identity of transaction—Unity of object—Criminal Procedure Code (Act V of 1898) s. 239.* Where, in consequence of certain persons having killed a cow on a zamindar's estate contrary to practice and eaten its flesh, they were taken to the *cutcherry* on the 14th December, fined therefor and confined till they had furnished security for the payment of the fine within three days, and on their failure to do so were again taken to the *cutcherry* and detained there, and on information given to the police, one of them was beaten and all ejected: *Held*, that the illegal confinement on the first day, and the similar confinement and assault on the second day were parts of the same transaction, the object of the accused on both days being the same, viz., to punish the persons for a breach of the rule by extorting the fine, and the assault on the second day being the conclusion of the transaction, and that the joint trial of the accused for offences under s. 347 of the Penal Code committed on the 14th and 18th and for that under s. 352 on the latter date by them was legal. *Emperor* v. *Datto Hanmant Shahapurkar*, I. L. R. 30 Bom. 49, and *Emperor* v. *Sherufalli Allibhoy*, I. L. R. 27 Bom. 135, approved. *Budhai Sheik* v. *Emperor*, I. L. R. 33

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Misjoinder—*concld.*
Calc. 292, and *Gul Mahomed Sircar* v. *Cheharu Mandal*, 10 C. W. N. 53, distinguished. DEPUTY LEGAL REMEMBRANCER *v.* KAILASH CHANDRA GHOSE (1914) I. L. R. 42 Calc. 760

Misjoinder of Charges : *See* CHARGE ... 957

———————*Joint trial for offences under s. 120B of the Penal Code and ss. 19 (f), 20 of the Arms Act, committed in pursuance of the object of the conspiracy—Identity of transaction—Criminal Procedure Code (Act V of 1898), s. 239—Joint possession of arms—Mere keeping of fire-arms not an offence. "Fire-arms" whether inclusive of parts of the same—Arms Act (XI of 1878) ss. 4, 5, 14, 19 (a) (f), 20—Criminal conspiracy, proof of—Punishment when act contemplated not done—Penal Code (Act XLV of 1860), ss. 109, 116, 120B.* A charge of criminal conspiracy to manufacture arms, under s. 120B of the Penal Code read with section 19 (*a*) of the Arms Act (XI of 1878), may be tried jointly with charges of offences under ss. 19 (*f*) and 20 of the latter Act committed in pursuance of the object of the conspiracy. As long as the conspiracy continues the transaction which began with the forming of the common intention continues, and the offences under ss. 19 (*f*) and 20 of the Arms Act are committed in the course of the same transaction. *Legal Remembrancer, Bengal* v. *Mon Mohan Roy*, 19 C. W. N. 672 ; 21 C. L. J. 195, followed. Where two persons rented a house and lived in it, and parts of arms were found in one of the rooms :—*Held*, that both being in joint occupation of the house, were in joint possession of the articles so found. The word " fire-arms " in s. 14, read with the meaning of "arms" in s. 4 of the Arms Act, includes parts of fire-arms. "Fire-arms" means only arms fired by gunpowder or other explosives. *Ahmed Hossein*

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Misjoinder of Charges—*concld.*
v. *Queen-Empress*, I L. R. 27 Calc. 692, *Emperor* v. *Dhan Singh*, 5 Cr. L. J. 435 ; 3 N. L. R. 53, followed. The offence under ss. 5 and 19 (*a*) of the Arms Act is not a mere keeping of arms, but a keeping of the same for sale. In cases of conspiracy, the agreement between the conspirators cannot generally be directly proved, but only inferred from the established facts of the case. Where two persons took a house in which a considerable number of pieces of fire-arms was found with tools and implements, and work had been actually done to some of the parts of fire-arms, the Court may and ought to infer a conspiracy to manufacture arms. *Per* CURIAM : Where there is only a conspiracy to manufacture arms, without an actual manufacture, the sentence should be imposed under s. 120B of the Penal Code read with s. 19 (*a*) of the Arms Act and s. 116 of the Penal Code, and the maximum term of imprisonment awardable under these sections is 9 months' rigorous imprisonment. *Per* BEACHCROFT J. The punishment awardable under s. 120B of the Penal Code varies according as the offence has or has not been committed in consequence of the conspiracy. If an offence has been committed, the punishment is that provided by s. 109 of the Penal Code, though, strictly speaking, there should not be a conviction in such cases of conspiracy but of abetment. If it has not been committed, the punishment is governed by s. 116 of the Penal Code. HARSHA NATH CHATTERJEE *v.* EMPEROR (1914) I L. R. 42 Calc. 1153

Misrepresentation : *See* CHUKANI RIGHT 28

Mitakshara : *See* HINDU LAW—MORTGAGE 1068

Mitakshara, Ch. II, ss. 5, 6 : *See* HINDU LAW—INHERITANCE 384

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Moghali Brahmottar: *See* MINERAL RIGHTS 346

Mortgage: *See* HINDU LAW—ALIENATION 876

———*See* HINDU LAW—MORTGAGE 1068

———*See* LIMITATION ... 294

———*See* PALAS OR TURNS OF WORSHIP 455

———*Interest—Loss of part of security by acquisition of mortgaged land—Mortgagee applying to Land Acquisition Judge for return of mortgage money (out of the compensation money) within term, whether entitled to interest for the whole term—Land Acquisition Act (I of 1894), ss. 18, 30.*—If the mortgagee makes a demand for payment within the term, and the mortgagor complies, the mortgagee cannot insist upon payment of interest for the whole of the term. *Letts* v. *Hutchins*, L. R. 13 Eq. 176, *In re Moss*, 31 Ch. D. 90, *Smith* v. *Smith*, [1891] 3 Ch. 550, referred to. Where the mortgagee has given notice requiring payment within the term, he cannot withdraw it without the consent of the mortgagor. *Suntley* v *Wilde*, [1899] 1 Ch. 747; 2 Ch. 474, followed Where the mortgagor agreed to keep the money for one year from 28th September 1912 on condition that the land should remain as security for the loan during the term, but one of the properties given as security had been acquired (the mortgagee probably having no knowledge thereof), and on the 11th October 1912 the mortgagor applied to the Land Acquisition Deputy Collector that the money due under the mortgage (including one full year's interest) might be paid to him out of the compensation money, and the mortgagor consented: *Held*, that as the contract between the parties could not be performed according to its letter by reason of circumstances beyond their control, the mortgagor was not bound to pay interest beyond the period of one month (as admitted by him). *Bakhtawar Begam* v. *Husaini Khanum*, I. L. R. 36 All. 195, explained. PROKASH CHANDRA GHOSE *v.* HASAN BANU BIBI (1914) I. L. R. 42 Calc. 1146

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Mortgage—*concld.*

———*Sale of mortgaged property for any claim of mortgagee unconnected with mortgage—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14—Transfer of Property Act (IV of 1882), s. 99.* A mortgagee is competent, under the Civil Procedure Code of 1908, to have his mortgaged property sold in satisfaction of any claim which he may have against the mortgagor, though the claim may be unconnected with the mortgage. TARAK NATH ADHIKARI *v.* BHUBANESHWAR MITRA (1914) I. L. R. 42 Calc. ... 780

Mortgage between Hindus: *See* DAMDUPAT, RULE OF 826

Mortgage Bond: *See* RECEIPT ... 546

———**Decree:** *See* INSOLVENCY ... 72

———**Suit:** *See* COMPROMISE ... 801

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Nepal whether a "Foreign State": *See* EXTRADITION WARRANT ... 793

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Notice: *See* ARREST OF SHIP ... 85

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Notification, defect in: *See* SALE FOR ARREARS OF REVENUE .. 897

Nuisance: *See* EASEMENT 46

Occupancy Holding—*Non-transferable occupancy holding, whether devisable by will—Bengal Tenancy Act (VIII of 1885), ss. 26, 178, sub s. (3) cl. (d)—Heir, if estopped by testator's act from claiming inheritance under the statute.* A non-transferable occupancy holding cannot be the subject of a valid

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Occupancy Holding—*contd.*

testamental disposition. In the case of a testamentary devise of such a holding, the heir-at-law is not debarred by the doctrine of estoppel from questioning its validity. *Hari Das Bairagi* v. *Udoy Chandra Das*, 12 C. W. N. 1086 ; 8 C. L. J. 261, not followed. AMULYA RATAN SIRCAR *v.* TARINI NATH DEY, (1914) I. L. R. 42 Calc. 254

———*Revenue Sale Law (Act XI of 1859), s. 37—Occupancy raiyats at fixed rates—Purchaser—Doctrine of Protection—Its extension.* The protection of occupancy raiyats at fixed rates, referred to in s. 37 of the Revenue Sale Law (Act XI of 1859), is not one of the ordinary exceptions in that section. It is a proviso expressing the determination of the Legislature that no purchaser shall disturb any of the permanent tenants on the land who are in actual occupation of the soil and are cultivating it. This doctrine of protection has recently been extended to ordinary occupancy raiyats. *Sarat Chandra Roy* v. *Asiman Bibi*, I. L. R. 31 Calc. 725, referred to. *Bhut Nath Naskar* v. *Surendra Nath Dutt*, 13 C. W. N. 1025, distinguished. ABDUL GANI CHOWDHURY *v.* MAKBUL ALI (1914) I. L. R. 42 Calc. 745

———*Transferability of part or whole—Consent of landlord—Operation of transfer as against raiyat, landlord and other persons—Civil Procedure Code (Act XIV of 1882), s. 244—Bengal Tenancy Act (VIII of 1885), s. 87.* In transfers, for value, of occupancy holdings, *apart from custom or local usage* : (i) The transfer of the whole or a part is operative against the raiyat,—(*a*) Where it is made voluntarily ; (*b*) where it is made involuntarily and the raiyat with knowledge fails or omits to have the sale set aside. A sale is made involuntarily, where it is in execution of a money decree, but not of a decree founded on a mortgage or charge voluntarily made. (ii) The transfer is operative as against the landlord in all cases in which it is operative against the raiyat, provided the landlord has given his previous or subsequent consent. Where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding ; but where the transfer is of a part only of the holding, or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding unless there has been (*a*) an abandonment within the meaning of s. 87 of the Bengal Tenancy Act, or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy. Whether there has been a relinquishment or repudiation or not depends on the substantial effect of what has been done in each case. (iii) The transfer of the whole or a part is operative as against all other persons where it is operative against the raiyat. DAYAMAYI *v.* ANANDA MOHAN ROY CHOWDHURY, (1914) I. L. R. 42 Calc. 172

Occupancy Raiyats at fixed rates: *See* OCCUPANCY HOLDING ... 745

Official Assignee, sale by: *See* INSOLVENCY 72

Official Witness, privilege of: *See* CHARGE 957

Onus of Proof: *See* CHAUKIDARI CHAKRAN LANDS 710

Ordinance, 1914—VI:—*See* COMMERCIAL INTERCOURSE WITH ENEMIES ORDINANCE 1094

Orissa, Zamindari Estates in: *See* CHAUKIDARI CHAKRAN LANDS ... 710

Palas or turns of worship—*Mortgage—Transferability of palas—Custom—Kalighat Temple—Estppel of mortgagor even if trustee—Essential attributes of valid custom—Public*

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Palas or turns of worship—*contd.*

policy, contravention of – Onus probandi—Civil Procedure Code (Act V of 1908), O. XXXIV—Chattels—Intangible property, foreclosure of mortgage of—Pledge. Per MOOKERJEE J. (BEACHCROFT J. reserving opinion). A mortgagor, even when acting in a public capacity and not for his own benefit, is estopped to deny his title, and cannot set up as a defence for himself against the mortgagee that the property so mortgaged is trust property which he had no right to mortgage. *Doe* v. *Horne*, L. R. 3 Q. B. 760 ; 61 R. R. 397, followed. This principle is inapplicable where the mortgage is void as contrary to Statute. *Barrow's Case*, 14 Ch. D. 432, followed. Trustees for a public purpose are not, by the nature of their office, protected from the operation of estoppel as against the assignees of the original parties to the deed in question. *Doe* v. *Horne*, L. R. 3 Q. B. 760 ; 61 R. R. 397, *Webb* v. *Herne*, L. R. 5 Q. B. 642, and *Higgs* v. *Assam Tea Co.*, L R. 4 Ex. 387, referred to. [View indicated by BANERJEE J. in *Mallika* v. *Ratanmani*, 1 C. W. N. 493, not accepted.] *Per* MOOKERJEE und BEACHCROFT JJ. "A custom to be valid must have four essential attributes: (i) it must be immemorial ; (ii) it must be reasonable ; (iii) it must have continued without interruption since its immemorial origin ; and (iv) it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect." *Tyson* v. *Smith*, 9 Ad. & El. 406, followed. A custom cannot be enlarged by parity of reasoning. *Arthur* v. *Bokenham*, 11 Mod. 148, *Pradyote* v. *Gopi Krishna*, I. L. R. 37 Calc. 322, referred to. "A custom originating within time of memory, even though existing in fact, is void at law." *Mayor of London* v. *Cox*, L. R. 2 H. L. 239, followed. Evidence showing exercise of a right in accordance with an alleged custom as far back as living testimony can go, raises the presumption, though only a rebuttable one, as to the immemorial existence of the custom. *Bastard* v. *Smith*, 2 Moo. & R. 129, *Mercer* v. *Denne*, [1904] 2 Ch. 534, followed. If the existence of the custom has been proved for a long period, the *onus* lies on the person seeking to disprove the custom to demonstrate its impossibility. If a custom be against reason (*i.e.*, artificial and legal reason warranted by authority of law) it has no force in law. When a custom is said to be void as being unreasonable, the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence, and not from any rights conferred in ancient times. *Salisbury* v. *Gladstone*, 9 H. L. C. 692, followed. The period for ascertaining, whether a particular custom is reasonable or not, is the time of its possible inception. *The Tanistry Case*, (1608) Davis 29, followed. In practice, the Kalighat Temple *palas* have been transferred during at least 90 years, though in a limited market which those alone can enter who are qualified to become shebait by birth or marriage, the time when this custom originated being unknown. Proof of the existence of a custom need not be carried back by direct evidence to the year 1773 when the Supreme Court was established, or even to 1793 when the first Regulations were passed by the Indian Legislature. The customary right to make a sale, mortgage, gift or lease of a *pala* in favour of persons within a limited circle (the trans-

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Palas or turns of worship—*concld.*

ference being under precisely the same obligation to the endowment as the transferor himself), is closely associated with and possibly developed out of the heritable, devisable, and partible character of a *pala*. *Janokee* v. *Gopaul*, I. L. R. 2 Calc. 365, referred to. A custom of this description clearly cannot be characterised on any rational grounds as unreasonable or opposed to public policy. Foreclosure, as a remedy of the mortgagee, is not confined to mortgages of *land*; it is equally applicable to mortgages of *chattels*. *Harrison* v. *Hart*, 1 Comyn. 393; 2 Eq. Cas. Abr. 6, followed. A mortgagee of *intangible* property is entitled to foreclose the mortgagor quite as much as a mortgagee of *chattels*. MAHAMAYA DEBI *v.* HARIDAS HALDAR, (1914) I. L. R. 42 Calc. ... 455

Pardanashin: *See* PRESENTATION OF COMPLAINT 19

————, examination of: *See* COMPLAINT 19

Pardon—*Failure of approver to comply with terms of the pardon on examination at the preliminary enquiry—Forfeiture of pardon—Commitment of approver along with other accused—Joint trial of approver and others—Plea of pardon taken in the Sessions Court—Proper procedure thereon—Trial of question of forfeiture as a preliminary issue—Power of Jury to determine the point—Criminal Procedure Code (Act V of 1898), ss. 298 (1) (c), 37.* Where an approver has forfeited his pardon, on his examination at the preliminary enquiry, the Magistrate may put him in the dock, recommence the enquiry and commit him for trial along with the other accused. *Queen-Empress* v. *Natu*, I. L. R. 27 Calc. 137, discussed. *Queen-Empress* v. *Brij Narain Man*, I. L. R. 20 All. 529, *Emperor* v. *Budhan*, I. L. R. 29 All. 24, *Sultan Khan* v. *King-Emperor*, 5 All. L. J. 691, and *King-Emperor* v. *Bala*, I. L. R 25 Bom. 675, followed. When an approver has been committed to the Court of Session as an accused he may plead his pardon in bar at the trial, and the Judge must first try the issue of forfeiture and take the verdict of the Jury thereon, and then proceed with the trial of accused for the offences charged. *Emperor* v. *Abani Bhushan Chuckerbutty*, I. L. R. 37 Calc. 845, discussed. *Kullan* v. *Emperor*, I. L. R. 32 Mad. 173, *Alagirisami Naicken* v. *Emperor*, I. L. R. 33 Mad. 514, *King-Emperor* v. *Bala*, I. L. R. 25 Bom. 675, *Emperor* v. *Kothia*, I. L. R. 30 Bom. 611, and *Emperor* v. *Kalu*, 31 Punj. Rec., 1904, approved. *Per* BEACHCROFT, J. Under the old law the pardon remained in force until its withdrawal, by the authority granting it, in consequence of the approver failing to observe the conditions of the pardon, but under the present law the result of such failure is that the approver may be put on trial without any formal order of withdrawal or cancellation of the pardon. The plea should be taken at the commencement of the preliminary enquiry and considered by the Magistrate. If he decides against it or it is not taken before him, the approver may raise the plea in the Sessions Court. The Judge ought to try the question of forfeiture as a preliminary issue, on evidence limited to the point, and take the verdict of the Jury on it before proceeding to try the general issue of the guilt of the accused. The onus of proof of forfeiture is on the Crown. *Queen-Empress* v. *Manick Chandra Sarkar*, I. L. R. 24 Calc. 492, declared obsolete. Where, however, the Judge tried the question of forfeture with the Jury after some evidence on the general issue had been recorded :—

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Pardon—*concld.*

Held, that the irregularity had not prejudiced the approver or the other accused. *Semble*: When the approver deviates from the conditions of his pardon in the Sessions Court, he cannot be removed from the witness box and placed in the dock as an accused. SHASHI RAJBANSHI *v.* EMPEROR (1914) I. L. R. 42 CALC. 856

——— *Withdrawal by Magistrate not granting the pardon—Omission to state grounds of forfeiture—Necessity of formal withdrawal or declaration of forfeiture—Plea of pardon to be raised at the trial—Trial of issues of forfeiture of pardon and guilt of accused—Criminal Procedure Code (Act V of 1898), ss. 337, 339.* Under the present law no formal withdrawal of pardon nor formal declaration of its forfeiture are required. If the approver be subsequently proceeded against, it is open to him to plead at his trial that the pardon has not, in fact, been forfeited, that is, that he has not violated its conditions. The two questions of forfeiture of pardon and of his guilt of the offence in respect of which he received the same, may be heard and determined together, under the circumstance. *Emperor* v *Kothia*, I. L. R. 30 Bom. 611, *Kullan* v. *Emperor*, I. L. R. 32 Mad. 173, and *Emperor* v. *Abani Bhushan Chuckerbutty*, I. L. R. 37 Calc. 845, referred to. EMPEROR v. SABAR AKUNJI (1914) I. L. R. 42 Calc. ... 756

Parties—*Civil Procedure Code (Act V of 1908), s. 92, O. I., r. 3—Public Religious Trust—Suit to remove a trustee and to recover possession of trust property in the hands of a third party—Joinder of parties—Alienee of trustee.* Where in a suit under s. 92 of the Civil Procedure Code (Act V of 1908), the second defendant, who was the alience of trust property, the subject of the suit, contended that the suit should be dismissed as against him on the

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Parties—*concld.*

ground that he was not a necessary party to it:—*Held*, that there is no reason why, having regard to the provisions of O. I. r. 3 of the Civil Procedure Code, the second defendant should not be made a party to the suit; nor why, if the decision of the Court is against him, he should not be declared to be a trustee of the trust property and be directed to convey the property. *Budh Singh Dhudhuria* v. *Niradbaran Roy*, 2 C. L. J. 431, and *Budree Das Mukim* v. *Choony Lal Johurry*, I. L. R. 33 Calc. 789, distinguished. *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers*, [1910] 2 K. B. 354, referred to. ALI HAFFIZ *v.* ABDUR RAHAMAN (1915) I. L. R. 42 Calc. 1135

Partition: *See* BABUANA GRANT ... 582

——— *See* COSTS 451

Partnership, dissolution of: *See* MINOR 225

——— **winding up of**: *See* APPEAL 914

Part-payment: *See* CHEQUE, PAYMENT BY 1043

Patni Lease—*Chota Nagpur Encumbered Estates Act (Bengal VI of 1876 as amended by Act V of 1884) s. 17—Rules under s. 19 of Act, Rule 16—Patni lease executed by Deputy Commissioner as manager of Barabhum Estate under the Act—Sanction of Commissioner—Objection that patni lease had not been submitted to Commissioner after he had sanctioned all the details—Sanction granted for lease to a firm and lease given to a Limited Company—Stipulation for payment of bonus—Payment after time fixed.* The grant of a patni lease under the Chota Nagpur Encumbered Estates Act (Bengal Act VI of 1876 as amended by Act V of 1884) s. 17, and rule 16 of the rules made under the Act, necessitate the sanction of the Commissioner. In a suit to have a patni lease executed

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Patni Lease—*contd.*

by the Deputy Commissioner as the manager under the Act of the Barabhum Estate on behalf of the proprietor, the father of the plaintiff (appellant), declared void and inoperative as not having received a valid sanction :—*Held*, that where it has been affirmatively established that a transaction itself in all its essential particulars has obtained the sanction of the Commissioner, and then it becomes requisite that the transaction be carried into effect by the preparation of an appropriate deed, an objection merely on the ground that the document ultimately prepared has not been submitted for sanction, cannot be sustained. In administrative and departmental action it must necessarily be the case that formal details may have to be entered upon in order to carry into effect, and put into legal shape the arrangement to which the sanction was given. Where such a sanction was given for a patni lease to be granted to "Robert Watson & Co.", a firm of individual men, and the actual lease was executed in favour of "Robert Watson & Co., Limited," the firm having been converted into a Limited Company :—*Held*, on the facts of the case, that when the negotiators in the course of the correspondence mentioned "Robert Watson & Co.," they did in fact mean and were perfectly understood to mean "Robert Watson & Co., Limited," the fact of the incorporation of the Limited concern being well known, and that therefore the misdescription did not, under the ordinary principle applicable to such matters, affect the validity of the sanction or of the patni lease. In this view it was unnecessary to decide as to the effect in law of the difference in the "*persona*" of the two descriptions. *Held*, also, that the sanction of the Commissioner in this case was not merely a sanction of a proposal to grant a patni.

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Patni Lease—*concld.*

The proposal had been made ; it had been accepted ; a contract was accordingly completed on the subject, and it was that contract so completed that was sanctioned. The patni lease stipulated for the payment of a *salami* or bonus, and the letter granting the sanction contained the clause, "provided the amount be paid before the end of March 1890." Some delay occurred owing to an exchange of views being necessary as to the actual wording of the draft patni, but the lease was finally settled by both parties, and the *salami* was paid on 25th June 1890 :—*Held*, that the lease would not afterwards have been open to a challenge to be made by the Deputy Commissioner himself, or for the Commissioner's sanction to be withdrawn ; and *a fortiori* there was no ground for sustaining such a challenge when put forward long afterwards on behalf of the debtor's successor by whom the suit was brought. RAM KANAI SINGH DEB DARPASHAHA *v.* MATHEWSON, (1915) I. L. R. 42 Calc. 1029

Penal Code (Act XLV of 1860), ss. 109, 116, 120 B : *See* MISJOINDER OF CHARGES 1153

——— **ss. 120, 120A, 120B, 121A :** *See* CHARGE ... 957

——— **s 225 B :** *See* WARRANT, VALIDITY OF ... 708

——— **s. 323 :** *See* BAILLFF 313

Penalty : *See* INTEREST ... 652, 690

Perjury—*Witness—Deposition not read over to witness in the hearing of accused or his pleader but read by witness himself—Inadmissibility of deposition in subsequent trial for giving false evidence—Proceeding against witness—Preliminary enquiry—Omission to record statements of witnesses examined thereat—Order for prosecution not containing assignment of the false statements—*

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Perjury—*concld.*

Criminal Procedure Code (Act V of 1898, ss. 360 (1), 476—Practice. Section 360 (1) of the Criminal Procedure Code requires the evidence of a witness to be read over to him in the hearing of the accused or his pleader, so as to enable the latter to correct any mistakes in it. The reading of the deposition by the witness himself is not a compliance with the section, and renders the record of it inadmissible in a subsequent trial against him under s. 193 of the Penal Code. *Mahendra Nath Misser v. Emperor*, 12 C. W. N. 845, and *Jyotish Chandra Mukerjee* v. *Emperor*, I. L. R. 36 Calc. 955, followed. Although s 476 of the Criminal Procedure Code does not expressly provide for the manner in which the preliminary inquiry thereunder is to be recorded, a summary of the statements of the witnesses examined thereat should be made. An order under the some section, directing the prosecution of a person for giving false evidence, should set out the statements alleged to be false. EMPEROR *v.* JOGENDRA NATH GHOSE (1904) I. L. R. 42 Calc. ... 240

Permanent Lease: *See* HINDU LAW—RELIGIOUS ENDOWMENT ... 536

Permanent Settlement: *See* FISHERY 489

Personal Covenant: *See* LIMITATION 294

Piecemeal Trial: *See* BAILIFF ... 313

Plaint: *See* COURT-FEE 370

Pleading: *See* ARREST OF SHIP ... 85

Pledge: *See* PALAS OR TURNS OF WORSHIP 455

Police Report: *See* SURETY ... 706

Possession, writ of: *See* BAILIFF ... 313

Power of Attorney: *See* COMPLAINT ... 19

Practice: *See* ACQUITTAL 612

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——— *See* APPEAL—CRIMINAL CASE 374

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Practice: *See* BAILIFF 313

——— *See* CONTEMPT OF COURT ... 1169

——— *See* EVIDENCE 784

——— *See* INSOLVENCY ... 109

——— *See* MAHOMEDAN LAW—MARRIAGE 351

——— *See* PERJURY 240

——— *See* PUBLIC PROSECUTOR, DUTY OF 422

——— *See* RATEABLE DISTRIBUTION 1

——— *Reference—Assessment of damages.* A reference should be directed by the Court to assess damages only when the enquiry would involve questions of detail which it would be wasting the time of the Court to investigate. *Wallis* v. *Sayers*, 6 T. L. R. 356, referred to. D. N. GHOSE & BROS. *v.* POPAT NARAIN BROS (1915) I. L. R. 42 Calc. 819

Preliminary Decree: *See* APPEAL ... 914

Preliminary Inquiry: *See* PERJURY ... 240

Preliminary Mortgage-decree: *See* LIMITATION 776

Prescription: *See* EASEMENT ... 164

Presentation: *See* COMPLAINT ... 19

Presidency Magistrates: *See* PIECEMEAL TRIAL 313

Presidency Small Cause Courts Act (XV of 1882, ss. 43. 48: *See* BAILIFF ... 313

Presidency Towns Insolvency Act (III of 1909), s. 38 (4), (5): *See* INSOLVENCY 109

Press Act (I of 1910) s. 4 (1): *See* FORFEITURE 730

Primogeniture: *See* HINDU LAW—INHERITANCE 1179

Principal and Agent: *See* SALE OF GOODS 1050

Priority: *See* CO-OPERATIVE SOCIETY ... 377

Privy Council, practice of—*Special leave to appeal in Criminal case, application for—Petitioners sentenced to death—Stay of execution*

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Privy Council, practice of—*concld.*

of sentences pending hearing of petition, refusal of—Tendering advice as to exercise of King's Prerogative of pardon. On an application for special leave to appeal in a case in which the petitioners had been sentenced to death, their Lordships of the Judicial Committee, not being a Court of Criminal Appeal, declined to interfere with regard to staying execution of the sentences pending the hearing, or to express any opinion as to whether they ought to be suspended. The tendering of advice to His Majesty as to the exercise of His Prerogative of pardon is a matter for the Executive Government, and is outside their Lordships' province. BALMUKUND *v.* KING-EMPEROR (1915) I. L. R. 42 Calc. 739

Probate: *See* GUARDIAN 953

Probate—*Revocation—Will, validity of—Proof in common form—Knowledge—Acquiescence—Delay—Probate and Administration Act (V of 1881) s. 50.* It does not matter by what facts knowledge of the grant of probate and acquiescence in it are established, for neither knowledge, nor acquiescence, nor lapse of time are of themselves operative as a bar to the proceeding which every person interested in the estate of the testator has a right to bring, if he was not made a party in the probate proceeding. His application must be *bonâ fide* and he must give some reasonable and true explanation of the delay. *Hoffman* v. *Norris*, 2 Phillim. 230, *Merryweather* v. *Turner*, 3 Curt. 802, and *Kunja Lal Chowdhury* v. *Kailash Chandra Chowdhury*, 14 C. W. N. 1068, referred to. MANORAMA CHOWDHURANI *v.* SHIVA SUNDARI MOZUMDAR (1914) I. L. R. 42 CALC. 480

Probate and Administration Act (V of 1881) s. 50: *See* PROBATE ... 480

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Procedure: *See* MAHOMEDAN LAW—MARRIAGE 351

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Proof in common form: *See* PROBATE... 480

Prosecution: *See* EVIDENCE ... 784

Prosecution, duty of: *See* CHARGE ... 957

Protection, doctrine of: *See* OCCUPANCY HOLDING 745

Provident Insurance—*Company with share capital carrying on business of a provident insurance society—Liability to registration as such before receiving premiums—Provident Insurance Societies Act (V of 1912) ss. 2 (8), 6, 7, 21.* A company having a share capital divided into shares must, if it intends to carry on the business of a provident insurance society, be registered under the Provident Insurance Societies Act (V of 1912) before it receives any premium or contribution. *Oriental Government Security Life Assurance Co.* v. *Oriental Assurance Co.*, I. L. R. 40 Calc. 570, explained. DEPUTY LEGAL REMEMBRANCER *v.* SITAL CHANDRA PAL (1914) I. L. R. 42 Calc. 300

Provident Insurance Societies Act (V of 1912) ss. 2 (8), 6, 7, 21: *See* PROVIDENT INSURANCE ... 300

Provincial Insolvency Act (III of 1907), ss. 4 cls. (b), (g), 16: *See* MINOR... 225

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ss. 13, 16, 34: *See* INSOLVENCY ... 289

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 8: *See* HOMESTEAD LAND 638

Public Demands Recovery Act (Beng. I of 1895, 1897): *See* SALE FOR ARREARS OF REVENUE ... 765

Public Nuisance—*Encroachment on public pathway—Application to District Magistrate by letter—Reference of applicant by letter to Civil Court—Subsequent petition to*

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Public Nuisance—*contd.*

the Subdivisional Magistrate regarding the same pathway—Issue of conditional order—Appearance of opposite party and claim of title to the path—Dropping proceedings without taking evidence—Criminal Procedure Code (Act V of 1898), ss. 133, 137. When a Magistrate makes a conditional order under s. 133 of the Criminal Procedure Code against a party who appears and shows cause, he is bound, under s. 137, to take evidence as in a summons case. It is open to him thereafter to consider whether there is a complete answer to the case, or whether it is not a proper one for reference to the Civil Court. SAROJBASHINI DEBI *v.* SRIPATI CHARAN CHOWDHRY (1914), I. L. R. 42 Calc. 702

———*Unlawful obstruction to public way—Bonâ fide question of title—Duty of Magistrate to determine the question—Criminal Procedure Code (Act V of 1898), ss. 133, 137. Per* SHARFUDDIN J. When a party, against whom an order under s. 133 of the Criminal Procedure Code is contemplated, appears and raises the question that a pathway, alleged to have been unlawfully obstructed, is not a public but a private one, the Magistrate should not only decide whether it is public or private, but he should determine whether the claim is *bonâ fide* or a mere pretence set up only to oust the jurisdiction of the Court. If he finds that the claim is a mere pretence, he may proceed to pass a final order; but if he finds that the claim, though not substantiated, has been raised *bonâ fide*, he should stay his hand and refer the party to the Civil Court, and if the party does not have recourse to such Court within a reasonable time, the Magistrate may then proceed to make the order absolute. *Belat Ali* v. *Abdur Rahim*, 8 C. W. N. 143, *Matukdhari Tewari* v. *Hari Madhab Das*, 9 C. W. N. 72, *Luckhee Narain Banerjee* v. *Ram Kumar Mukherjee*, I. L. R. 15 Calc. 564, and *Preonath Dey* v. *Gobordhone Malo*, I. L. R. 25 Calc. 278, referred to. The provisions of s. 133 of the Code should be sparingly used. TEUNON J., in the circumstances of the case, assented to the order proposed. MANIPUR DEY *v.* BIDHU BHUSHAN SARKAR (1914), I. L. R. 42 Calc. ... 158

Public Pathway, encroachment on: *See* PUBLIC NUISANCE 702

Public Policy: *See* SLAVERY BOND ... 742

———, **contravention of:** *See* PALAS OR TURNS OF WORSHIP ... 455

Public Prosecutor, duty of:—*Duty to produce all the evidence in his power bearing directly on the charge—Duty to call all the available eye-witnesses in capital cases—Omission to examine material witnesses, effect of—Inference adverse to the prosecution arising therefrom—Practice.* The purpose of a criminal trial is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused; and the duty of a Public Prosecutor is to represent not the police but the Crown, and this duty should be discharged fairly and fearlessly and with a full sense of the responsibility attaching to his position. It is not his duty to call only witnesses who speak in his favour. *Empress* v. *Dhunno Kazi*, I. L. R. 8 Calc. 121, discussed and explained. He should, in a capital case, place before the Court the testimony of all the available eye-witnesses, though brought to the Court by the defence, and though they give different accounts. The rule is not a technical one, but founded on common sense and humanity. *Reg.* v. *Holden*, 8 C. & P. 609,

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Public Prosecutor, duty of—*concld.*

followed. Where witnesses (who from their connection with the transactions in question must be able to give important information) are not called without sufficient reasons being shown, the Court may properly draw an inference adverse to the prosecution. *Empress* v. *Dhunno Kazi*, I. L. R. 8 Calc. 121, referred to. A conviction under s. 114 of the Penal Code cannot stand where the abetment charged necessarily requires the presence of the abettor. To come within the section, the abetment must be complete apart form the presence of the abettor. RAM RANJAN ROY *v.* EMPEROR (1914) I. L. R. 42 Calc. 422

Public Religious Trust: *See* PARTIES ... 1135

Public Way, obstruction to: *See* PUBLIC NUISANCE 158

Purchaser: *See* OCCUPANCY HOLDING ... 745

Railway Company, liability of: *See* REMAND 888

Railways Act (IX of 1890), s. 75: *See* REMAND 888

Rateable Distribution—*Practice and Procedure—Decree—Civil Procedure Code (Act V of 1908) ss. 47, 73—Civil Procedure Code (Act XIV of 1882) s. 295—Appeal.* An order refusing rateable distribution made under s. 73 of the Code of Civil Procedure (Act V of 1908) between two rival decree-holders, which does not affect or interest the judgment-debtor, is an *order* in execution proceedings but is not a *decree*, as all the conditions enumerated in s. 47 of that Code are not present, and consequently is not appealable. *Jagadish Chandra Shaha* v. *Kripanath Shaha*, I. L. R. 36 Calc. 130, followed. *Sorabjit Coovarji* v. *Kala Raghunath*, I. L. R. 36 Bom. 156, distinguished. It is essential for the application of s. 73 of the Code of Civil Procedure that the decree should have been passed against the same

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Rateable Distribution—*concld.*

judgment-debtor. BALMER LAWRIE & Co. *v.* JADUNATH BANERJEE (1914) I. L. R. 42 Calc. ... 1

Rates and Taxes, arrears of—*Consolidated rate—Charge—Calcutta Municipal Act (Beng. III of 1899), ss. 223, 228—Arrear of consolidated rates, whether a first charge on the land and building in respect of which it has accrued due—Charge and mortgage, distinction between—Transfer of Property Act (IV of 1882), ss. 55, 58, 100—Bengal Tenancy Act (VIII of 1885), s. 171—Constructive notice—Bonâ fide purchaser for value without notice.* Section 228 of the Calcutta Municipal Act is not controlled by section 223 thereof, and makes the consolidated rate, as it accrues due from time to time, a first charge on the premises (subject only to arrears of land revenue). A mortgage does, whereas a charge does not, involve a transfer of an interest in specific immoveable property. *Narayana* v. *Venkantaramana*, I. L. R. 25 Mad. 220, *Tancred* v. *Delagoa Bay Co.*, 23 Q. B. D. 239, *Burlinson* v. *Hall*, 12 Q. B. D. 347, referred to. Such a charge cannot be enforced against the property in the hands of a *bonâ fide* purchaser for value without notice. *Kishen Lal* v. *Ganga Ram*, I. L. R. 13 All. 28, referred to. The plea of purchaser for value without notice is a single defence, the onus of proving which is on the defendant. *Attorney-General* v. *Biphosphated Guano Co.*, 11 Ch. D. 327, *Wilkes* v. *Spooner*, [1911] 2 K. B. 473, followed. Where property with such a charge is foreclosed by the mortgagee, constructive notice cannot be imputed to him to the same extent as to a purchaser at a private sale. *Radha Madhab* v. *Kalpataru*, 17 C. L. J. 209, *Brahma* v. *Bholi Das*, 19 C. L. J. 352, referred to. Still he should ascertain the true state of affairs

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before he becomes full owner thereof. Although a purchaser without notice from a person who had notice, is protected [*vide Harrison* v. *Forth*, (1695) Finch's Prec. Ch. 51] here, purchasers from such a mortgagee cannot claim the protection as, before they acquire title, they might by inquiry from the municipal authorities ascertain the precise period for which the rates were in arrears. AKHOY KUMAR BANERJEE *v.* CORPORATION OF CALCUTTA (1914) I. L. R. 42 Calc. 625

Ratification: *See* TRADING WITH THE ENEMY 1094

Receipt—*Registration — Waiver — Evidence—Registration Act (III of 1877), s. 17 (n)—Mortgage-bond—Receipt showing simple interest charged—Evidence Act (I of 1872), s. 92.* A receipt, which purports to show that simple and not compound interest was to be charged (though the mortgage-bond contained provision for the payment of compound interest), is admissible in evidence. Such a receipt operates as a full acquittance for the money paid and requires no registration. *Jewan Ali Beg* v. *Basa Mal*, I. L. R. 9 All. 108, followed. KAILASH CHANDRA NATH *v.* SHEIKH CHHENU (1914) I. L. R. 42 Calc. 546

Receiver: *See* INSOLVENCY ... 289

Receiver in Insolvency: *See* MINOR ... 225

Redemption, suit for: *See* COMPROMISE 801

Reference: *See* PRACTICE 819

———*Jury Trials—Power of Judge to refer the case of an accused as to whom he agrees with the verdict—Legality of procedure—Criminal Procedure Code (Act V of 1898) s. 307 (2)—Confessions of co-accused—Corroboration—Sufficiency of circumstances raising a mere suspicion.* Section 307 (2) of the Criminal Procedure Code

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Reference—*concld.*

contemplates a reference only in the case of those accused as to whom the Judge declines to accept the verdict of the Jury. When he agrees with them in respect of any particular accused he ought to acquit or convict and sentence the latter as the case may be. Confessions of the co-accused can be taken into consideration, but the Court requires corroboration before acting on them. EMPEROR *v.* BABAR ALI GAZI (1914) I. L. R 42 Calc. 789

Refund: *See* UNDUE INFLUENCE ... 286

Registration: *See* PROVIDENT INSURANCE 300

———: *See* RECEIPT ... 546

Registration Act (III of 1877) s. 17 (*n*): *See* RECEIPT 546

Regulation I of 1793, s. 8 cl. (4): *See* CHAUKIDARI CHAKRAN LANDS ... 710

Regulation XXXVII of 1793, s. 15: *See* JAIGIR 305

Regulation XII of 1805, s. 35: *See* CHAUKIDARI CHAKRAN LANDS ... 710

Regulation XIII of 1805, s. 41: *See* CHAUKIDARI CHAKRAN LANDS ... 710

Regulation XI of 1825: *See* FISHERY ... 489

Religious Endowment: *See* HINDU LAW 536

Relinquishment: *See* UNDER-RAIYATI HOLDING 751

Remand—*New case—Second appeal—Finding of fact—High Court, power of—Silk—Railway Company, liability of—Railways Act (IX of 1890), s. 75—Practice.* A new case cannot be made on behalf of the plaintiff on remand. After there has been a decision of fact in the two Courts of original and first appellate jurisdiction, the High Court cannot entertain a second appeal upon any question as to the soundness of findings of fact by the lower Appellate Court. If there is evidence to be considered the decision of the second Court, however unsatisfactory it might be, when examined, must stand final. *Ramratan Sukul*

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Remand—*concld.*

v. *Nandu*, I. L. R. 19 Calc. 249, referred to. The question whether silk in manufactured or unmanufactured state is to be treated as silk is a question of fact. *Brunt* v. *Midland Railway Company*, 33 Exch. 187, *Hiatunissa* v. *Kailashh Chandra Saha*, 16 C. L. J. 259, *Lakhmidas Hira Chand* v. *The Great Indian Peninsular Railway*, 4 Bom. H. C. 129, *Shaminadha Mudali* v. *The South Indian Railway Company*, I. L. R. 6 Mad. 420, *Pundalick Udaji Judhav* v. *S. M. Railway Co.*, I. L. R. 33 Bom. 703, referred to. EAST INDIAN RAILWAY COMPANY *v.* CHANGAI KHAN (1915), I. L. R. 42 Calc. 888

Rent, suit for: *See* HOMESTEAD LAND ... 638

Rescue from Lawful Custody: *See* WARRANT, VALIDITY OF ... 708

Res judicata: *See* LIMITATION ... 244

Resumption: *See* CHAUKIDARI CHAKRAN LANDS 710

Revenue Sale Law (Act XI of 1859) ss. 6, 10 to 13, 33: *See* SALE FOR ARREARS OF REVENUE ... 897

——————s. 37: *See* OCCUPANCY HOLDING 745

——————s. 37, cl. (4): *See* HOMESTEAD LAND 638

Reversioner, consent of: *See* HINDU LAW—ALIENATION 876

Review—*Application for review on ground of discovery of new matter or evidence—Appeal—"Strict proof," meaning of—Civil Procedure Code (Act XIV of 1882) ss. 626 cl. (b), 629—Civil Procedure Code (Act V of 1908) O. XLVII, rr. 4 (2) (b), 7 (1) (b).* In section 626 of the Code of 1882 "strict proof" does not mean proof that convinces the Appellate Court but that there must be legal proof adduced before the Court that has to deal originally with the question of granting a review. The whole

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scheme of the Act recognises that with proper safeguards the Court of first instance is the proper Court to determine whether or not there should be a review, but that before a review is granted those safeguards must be observed. *Per* JENKINS C.J. "Proof" ordinarily has one of two meanings; either the conviction of the judicial mind on a certain fact, or the means which may help towards arriving at that conviction: the use of the word "strict" points to the second of these two meanings; and "strict proof" means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence. It is formality that is prescribed, and not the result that is described. *Per* WOODROFFE J. Cl. (*b*) of sub-s. (*1*) of rule 7 of O. XLVII of the new Code does not refer to the weight or sufficiency of the evidence. If the legal formalities are observed it is no objection that the probative force of evidence legally taken appears to be different to the Appellate Court from what it appeared to the Court granting review. "Strict proof" means proof according to the formalities of law. It does not refer to sufficiency of proof in securing a particular conviction. Whether the proof is according to law or not is within the jurisdiction of the Appellate Court to determine; the question of sufficiency of evidence is for the Court admitting the review. *Gyanund Asram* v. *Bepin Mohun Sen*, I. L. R. 22 Calc. 734, *Bhyrub Chunder Surmah Chowdhuri* v. *Madhub Chunder Surmah*, 11 B. L. R. (F. B.) 423; 20 W. R. 84, *Chunder Churn Auggrodany* v. *Loodunram Deb*, 25 W. R. 324, *Koleemooddeen Mundul* v. *Heerun Mundul* 24 W. R. 186,

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referred to. AHID KHONDKAR *v.* MAHENDRA LAL DE (1915) I. L. R. 42 Calc. 830

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———*Extradition warrant issued by Resident in Nepal—Proceedings thereon by District Magistrate in British India, and order of surrender of fugitive—Power of High Court to interfere in revision with such order—Nepal, whether a "Foreign State"—Criminal Procedure Code (Act V of 1898) ss. 435, 439, 491—Extradition Act (XV of 1903) ss. 7, 15.* Nepal is not a "Foreign State" within the meaning of the Indian Extradition Act (XV of 1903). Where a warrant has been issued by the Political Agent, under s. 7 of the Act, its execution by the District Magistrate in British India, in accordance with the Act, is an executive act, and the High Court cannot interfere in revision with the proceedings of the Magistrate and the order to surrender the fugitive criminal, but if the latter considers himself aggrieved thereby he can invoke the action of the Government under s. 15. The power of the High Court, however, to interfere under s. 491 of the Criminal Procedure Code, which applies whatever be the occasion of the deprivation of the liberty of the subject, remains untouched by the Extradiction Act. GULLI SAHU *v.* EMPEROR (1915) I. L. R. 42 Calc.... 793

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Sale for Arrears of Revenue—*Setting aside sale—Irregularity—Arrears under Act XI of 1859 paid—Embankment charges due—Sale under Act XI of 1859 as for arrears of revenue instead of under Public Demands Recovery Act (Beng. Act I of 1895 as amended by Beng. Act I of 1897)—Embankment Act (Beng. Act II of 1882).* In this case the High Court set aside a sale for arrears of revenue, holding that where the Collector had acknowledged payment in full of the arrears of land revenue for which the sale had been advertised, and had elected to proceed by certificate procedure against an arrear of different character, and had already directed a sale under that procedure, he could not turn round and treat the arrear under the certificate as an arrear of land revenue without any notice to the parties under section 5, and proceed to sell under the land revenue proclamation or the mere ground that no special exemption had been passed. The embankment charges ordered to be levied under the Certificate Act (Beng. Act I of 1895 as amended by Beng. Act I of 1897) were taken out of the purview of Act XI of 1859 unless and until fresh notices were issued under section 5, and they could not be treated as arrears of land revenue. The sale therefore, not being for an arrear of land revenue, was liable to be set aside. An appeal from that decision was dismissed by their Lordships of the Judicial Committee, who said they saw no reason to interfere with it. DHIRAJ CHANDRA BOSE *v.* HARI DASI DEBI (1914) I. L. R. 42 Calc. 765

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———*Setting aside sale—Defect in specification of property to be sold in notification of sale—Ijmali share in property where there are many separate accounts opened—Revenue Sale Law (Act XI of 1859) ss. 6, 10, 11, 13, 33—Inadequacy of price caused by want of proper specification of the property for sale.* The *ijmali* or joint share in a mahal in which 148 of the owners of specific but undivided shares had obtained

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from the Collector separation of accounts under sections 10 and 11 of Act XI of 1859 was put up to sale for arrears of revenue, and purchased by the respondent. In the notification under sections 6 and 13 of the Act, the specification of the share to be sold was in the following terms :—"*Ijmali* share which cannot be specified excluding the separate accounts, number—." Then followed a list of the 148 separate accounts referred to, and at the end it was stated that "All other shares besides that specified are excluded from the sale." And the entry in column 5 (the specification column) was "The *ijmali* share cannot be particularised owing to separate accounts having been opened. The shares to be sold are those given in a separate sheet after excluding the shares in respect of which the separate accounts have been opened." In a suit to set aside the sale :—*Held* (reversing the decision of the High Court), that the notification of sale was insufficient and irregular, and not in compliance with the requirements of the law. Each case must depend on its own particular facts ; and what had to be considered was whether, having regard to all the circumstances, the specification was sufficiently clear to induce likely buyers to appear and bid at the sale. It was not enough that they might go and obtain the requisite information from the Collector's office : the particulars in the notice should be sufficient in themselves to tell purchasers what they were invited to bid for. *Held*, also, on the evidence, that the property had been sold at an inadequate price, and that the lowness of the price was due to the defectiveness of the specification of the property to be sold in the notification of sale, which was not merely an irregularity but a defect that rendered the sale void. RAVANESHWAR PRASAD SINGH *v.* BAIJNATH RAM GOENKA (1915), I. L. R. 42 Calc. ... 897

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Sale of Goods—*Bought and sold notes*—"*Bought by your order and for your account from our principals*"—*Principal and Agent*—*Personal liability of brokers*—*Contract Act* (*IX of 1872*), *s.* 230(2)—*Broker, an intermediary*—*Contract of employment*—*Award.* Where a broker signed and sent to a party a bought note in the following terms : "We have this day bought by your order and for your account from our principals . . . . 250 bales of jute . . . . . (name) Brokers," and a corresponding sold note was signed and sent by the broker to another party, the names of the principals being disclosed to each other, by the broker, at a subsequent date :—*Held*, in proceedings taken by the buyer, that the broker was merely an intermediary and not an agent for sale, and was not liable under section 230 (*2*) of the Contract Act. The contract (if any) between the broker and the buyer was a contract of employment, the employment being to negotiate, and not to sell, on behalf of another. *Southwell* v. *Bowditch*, L. R. 1 C. P. 374, followed. *Gubboy* v. *Avetoom*, I. L. R. 17 Calc. 449, distinguished. PATIRAM BANERJEE *v.* KANKNARRAH CO., LD. (1915) I. L. R. 42 Calc. 1050

Sanad, construction of : *See* JAIGIR ... 305

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Deputy Magistrates at a place, and one of them is transferred, the Deputy Magistrate who comes to fill the gap is not the successor in office of the outgoing Magistrate. *Mohesh Chandra Saha* v. *Emperor*, I. L. R. 35 Calc. 457, referred to. Where a proceeding under s. 107 of the Code, during the course of which a forged pottah was filed and evidence given in support thereof, was disposed of by H. K. G., a Deputy Magistrate, who became afterwards the officer next senior to the Subdivisional Magistrate, and on the transfer of the former, two other Deputy Magistrates became successively the next senior officers, and ultimately K. L. M., a Deputy Magistrate, joined the subdivision as the next senior officer, and an application was made to him for sanction to prosecute the petitioners for offences, under ss. 471 and 193 of the Penal Code, committed in the Court of H. K. G.:—*Held*, that K. L. M. was not the successor in office of H. K. G. and had no power to grant sanction under the circumstances. GIRISH CHANDRA RAY *v.* SARAT CHANDRA SINGH (1914) I. L. R. 42 Calc. ... 667

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Succession Certificate—*Succession Certificate Act (VII of 1889), s. 4—"Debt," meaning of—Part of debt, if certificate can be granted in respect of—Appeal.* A certificate under the Succession Certificate Act can be granted in respect of a part only of a debt due to the deceased. The word "debt" is a comprehensive term, which should receive a liberal construction. *Re Ghansham Das*, (1893) All. W. N. 84, and *Mahomed Abdul Hossain* v. *Sarifan*, 16 C. W. N. 231, approved and followed. *Akbar Khan* v. *Bilkisara Begam*, (1901) All. W. N. 125, considered. *Bibee Boodhun* v. *Jan Khan*, 13 W. R. 265, *Muhammed Ali Khan* v. *Pattan Bibi*, I. L. R. 19 All. 129, *Bismilla Begam* v. *Tawassul Husain*, I. L. R. 32 All. 335, and *Ghafur Khan* v. *Kalandari Begam*, I. L. R. 33 All. 327, not followed. ANNAPURNA DASEE *v.* NALINI MOHAN DAS (1914) I. L. R. 42 Calc. ... 10

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Summons—*Service of summons—Indian Marine Service—Civil Procedure Code (Act V of 1908) O. V, rr. 15, 17 and 27—Ex parte decree—Officer or mechanic in the employ of the Indian Marine.* Under the Civil Procedure Code an officer or mechanic in the employ of the Indian Marine is subject to exactly the same rules as any other person as regards service of summons. They come within the operation of rules 15 and 17 of Order V of the Code of Civil Procedure. INTU MEAH MISTRY *v.* DARBUKSH BHUIYAN (1914) I. L. R. 42 Calc.... 67

Surety—*Rejection of sureties only on Police report without judicial enquiry into their fitness—Inquiry to be held by the Magistrate passing the order for security—Criminal Procedure Code (Act V of 1898), ss. 118, 122.* Sureties tendered by a party bound down under s. 118 of the Criminal Procedure Code should not be rejected on a police report as to their fitness but only after a judicial enquiry under s. 122, and by the Magistrate who has passed the order for security. AKBAR ALI MAHOMED *v.* EMPEROR (1914), I. L. R. 42 Calc. ... 706

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Title, proof of: *See* FISHERY ... 489

Title, question of: *See* PUBLIC NUISANCE 158

Trade-mark—*Title—Assignment—Trade-mark in selection of natural products as indicating quality—Goodwill—License to use trade-mark—Action for royalty—Estoppel—Licensee estopped from questioning validity of license—Evidence Act (I of 1872) s. 117—Damages, action for.* In India the law of trade-marks is not governed by statute, there being no statutory system of registration. Rights and liabilities in connection with trade-marks are determined by reference to the principles of the common Law of England. *British-American Tobacoo Co., Ld.* v. *Mahboob Buksh*, I. L. R. 38 Calc. 110, referred to. A trade-mark cannot be transferred or descend in gross, but only together with the goodwill of the business to which it relates. A trade-mark represents the origin of the goods to which it is attached or their trade association : the truth of the representation is essential. By usage, successors in business may use their predecessors' trade-marks where the representation still continues to be substantially true. A selector of natural products like jute may have a trade-mark, in connection with such selection, as indicating good quality. *Major Brothers* v. *Franklin & Son*, [1908] 1 K. B. 712, followed. Meaning of "goodwill" explained. *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Ld.*, [1901] A. C. 217, referred to. In a suit for royalty, brought by the licensors of certain jute trade-marks against the licensees, the defence taken was that the plaintiffs had no title to the marks in question, and that the license was void :—*Held*, that by virtue of s. 117 of the Evidence Act the licensees were estopped from questioning their licensors' title or the validity of the license. At any rate s. 117 cast on the defendants the burden of proving that the goodwill of the business had not passed to the plaintiffs to support the transfer of the trade-marks, and the defendants having failed to do so the plaintiffs were entitled to the royalty claimed. Claim to damages by the licensors for depreciation in the value of the trade-marks due to the default of the licensees, refused on the facts of the case. The

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decision of IMAM J. in *Jagarnath & Co.* v. *Cressuell and Others*, I. L. R., 40 Calc. 814, affirmed. HANNAH *v.* JUGGERNATH & Co. (1914) I. L. R. 42 CALC. ... 262

Trading with the Enemy—*Acts done and directions given before date of the Ordinance, relevancy of—Subsequent ratification—"Trading," meaning of—Directions to an agent to take delivery of goods lying in London, and to sell to German firm against payment—Supply of goods to agent and sale by him to German firm—"Destined," meaning of—Legal and actual destination—Goods shipped to enemy country before the war but taken up by English firm in London—Exportation of goods to accused's agent in Italy refused by such firm because of Royal Proclamation—Abetment of supply to, or of trading by, the agent—Power of Appellate Court to alter conviction of principal offence to one of abetment—Discretion of Court—Commercial Intercourse with Enemies Ordinance (VI of 1914), s. 3—Trading with the Enemy Proclamation No. 2 cls. 5(7), (9)—Royal Proclamation of 15th October 1914—Criminal Procedure Code (Act V of 1898), s. 423.* Where a case of mica was shipped by the accused to a German firm before the war but arrived in London after its outbreak and was taken up by an English firm, whereupon he wrote, before the date of the Ordinance VI of 1914, viz., 14th October 1914, to a Bank in London, to make over the case to the English firm, and also to the latter to take it up and send the same to his agent at Genoa on application by such agent which, however, the English firm refused to do by reason of the prohibition of the export of mica to Italy by Royal Proclamation, and further wrote to the agent to apply to the English firm for the mica, and to deliver it to a German purchaser against payment, and where, after the date of the Ordinance, the accused again wrote to his agent informing him of his aforesaid letters and instructions to the Bank and the English firm, and directing the agent to apply for the case of mica to the latter and to deliver it to the German purchaser against payment, which directions were not in fact carried out on account of the refusal by the English firm to export the mica to Italy:—*Held*, that, as the Ordinance was not retrospective, the only acts and directions which the Court could take into consideration, to establish the offence of trading with the enemy, were such as were done or given after the date of its enactment, unless the previous acts and directions were ratified thereby. *Quære*: Whether mere directions to an agent to apply for goods in the possession of a third person, and to deliver the same to an enemy against payment amount to "trading" within the meaning of the Trading with the Enemy Proclamation No. 2, cl. 5 (7). The word "destined" when used with the term "trading," in the same sub-clause, means "intended for" and not "on the way to." *Legal* destination must not be confused with *actual* destination. The Court must determine whether the goods were actually destined for an enemy and with reference only to acts done and directions given after the date of the Ordinance VI of 1914. If the English firm had really purchased the goods outright, they were not in existence, so far as any disposition of them by the accused was concerned, after the date they were taken up and paid for, and could not be destined for an enemy. But assuming that the said firm had merely taken over the goods on behalf of the accused and subject to his further instructions, a direction to the agent to apply

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for and deliver them to a German purchaser against payment was insufficient to give the goods an enemy destination in fact, as such direction had no operation on receipt thereof by reason of the refusal of the English firm to export the goods to the agent at Genoa. *Held*, also, that, as the point was not free from doubt, the accused was entitled to the benefit of it. It is not a universal rule that in no case can an Appellate Court convict an accused of abetment, when he was charged only with the principal offence. But it is discretionary with the Appellate Court to allow such fresh charge being tried on appeal. The Court refused, under the circumstances of the case, to alter the conviction to one of abetment of supply to, or of trading by, the agent. Where the agent of the accused sold and delivered some cases of mica, and handed over the shipping documents for certain other cases lying in London, to a German firm or its agent in Genoa :—*Held*, *per* BEACHCROFT AND GREAVES JJ., that the accused was guilty of the offence of supplying goods to the enemy within cl. 5 (7) of the Trading with the Enemy Ordinance No. 2. INDAR CHAND *v.* EMPEROR (1915) I. L. R. 42 Calc. 1094

Trading with the Enemy Proclamation No. 2 cls. (7), (9): *See* TRADING WITH THE ENEMY 1094

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———*Transfer by District Judge of particular case to Additional Judge —Civil Courts Act (XII of 1887), ss. 8, sub-s. (2), 22, sub-s. (2)—Probate and Administration Act (V of 1881), ss. 3, 51, 53.* It is competent to a District Judge to transfer a particular case to an Additional Judge under the provisions of sub-s. (2) of s. 8 of the

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Civil Courts Act of 1887. RUP KISHORE LAL *v.* NEMAN BIBI (1915) I. L. R. 42 Calc. 842

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Under-raiyati Holding—*Transferability —Transfer of Property Act (IV of 1882), s. 117—Agricultural lands —Relinquishment or abandonment, what constitutes.* An under-raiyti holding is not transferable. What is relinquishment or abandonment depends on the substantial effect of what has been done in each case. When a tenure or holding, apart

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from the Transfer of Property Act, is not transferable, it cannot become so unless it is expressly made so by some other statute. If it had been intended to make holdings transferable which were before non-transferable, the Legislature in framing the Bengal Tenancy Act would have said so. Section 117 of the Transfer of Property Act excludes agricultural land from the operation of the rule which makes leasehold property transferable. *Hiramoti Dassya* v. *Annoda Prosad Ghose*, 7 C. L. J. 555, followed. AMINNESSA *v.* JINNAT ALI (1914) I. L. R. 42 Calc. ... 751

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———*Contract—Illegal composition of non-compoundable offence—Stifling prosecution—Suit for refund—Contract Act (IX of 1872), ss. 16, 19.* No refund of money or return of security, given under agreement not to prosecute a criminal case, will be allowed unless circumstances disclose pressure or undue influence. Mere fear of punishment in a criminal case does not constitue undue influence, *Jones* v. *Merionethshire Building Society*, [1892] I Ch. 173, referred to. AMJADENNESSA BIBI *v.* RAHIM BUKSH SHIKDAR (1914) I. L. R. 42 Calc. 286

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Court), that on the construction of a deed of sale, and on the evidence in, and under the circumstances of the case, the title vested in an executor passed to the appellants under the deed, by which he together with other vendors purported to convey "all his estate, right, title, claim, and demand whatsoever" in the property sold, although he did not expressly state therein that he was conveying the property in his capacity as executor. The plain legal interpretation of the deed should not be allowed to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some or all of the parties to the conveyance at the date of its execution. The deed stated plainly that whatever right or title the vendors possessed was to go to support the conveyance, and it is a settled rule that the meaning of a deed is to be decided by the language used interpreted in a natural sense. BIJRAJ NOPANI *v.* PURA SUNDARY DASEE (1914) I. L. R. 42 Calc. ... 56

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Warrant, validity of—*Warrant signed but not sealed—Arrest under such warrant—Rescue and escape from lawful custody—Criminal Procedure Code (Act V of 1898), s. 75 (1)—Penal Code (Act XLV of 1860), s. 225 B.* Under s. 75 of the Criminal Procedure Code, the affixing of the seal of the Court is essential to the validity of a warrant. An arrest under a warrant duly signed but not sealed is, therefore. illegal : and a conviction under s. 225B of the Penal

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